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In the
Supreme Court of the United States
October Term, 1997

Deborah West, in her individual capacity and official capacity as an agent of the State of North Carolina; Janice Faulkner, Secretary of Revenue, State of North Carolina, in her official capacity; State of North Carolina,

Petitioners,

v.

David L. Lynn, Jr.; Robin Dixon Lynn; Rodney Lynn; Roxanne Lynn; David L. Lynn, Sr.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court below erroneously extend this Court's holding in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994) -- which involved a "unique" state drug tax owed only by arrestees on property they no longer possess -- to hold that North Carolina's clearly distinguishable law is a "criminal penalty"?

2. Does the Tax Injunction Act, 28 U.S.C. § 1341, bar the United States courts from assuming jurisdiction to declare North Carolina's drug tax unconstitutionally imposed?

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Deborah West, in her individual capacity and official capacity as an agent of the State of North Carolina; Janice Faulkner, Secretary of Revenue, State of North Carolina, in her official capacity; State of North Carolina,

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David L. Lynn, Jr.; Robin Dixon Lynn; Rodney Lynn; Roxanne Lynn; David L. Lynn, Sr.,

Respondents,

PETITION FOR WRIT OF CERTIORARI

The defendants/petitioners, Deborah West, Janice Faulkner, and the State of North Carolina, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals panel is reported at 134 F.3d 582 and is reprinted at pages 1a-34a of the appendix to this petition. The order of the court of appeals *in banc* denying the petitioners' petition for rehearing and suggestion for rehearing *in banc* was filed on February 9, 1998, and is

reprinted at page 59a of the appendix. The district court's order dismissing the complaint is unreported and is reprinted at pages 35a-57a of the appendix.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1998. The court denied rehearing and rehearing *in banc* on February 9, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Tax Injunction Act, 28 U.S.C. § 1341, provides;

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State

law where a plain, speedy and efficient remedy may be had in the courts of such State.

North Carolina General Statutes §§ 105-113.105 through 105-113.113 are set out in the appendix at 61a through 80a.

STATEMENT OF THE CASE

Since 1990, North Carolina has imposed an excise tax on the possession of specified quantities of marijuana and controlled substances pursuant to the North Carolina Excise Tax on Controlled Substances, N.C. GEN. STAT. § 105-113.105 to N.C. GEN. STAT. § 105-113.113.[1] The purpose of the tax, as expressly stated by the North Carolina General Assembly, "is to levy an excise tax on persons who possess controlled substances in violation of North Carolina law . . . ." N.C. GEN. STAT. § 105-113.105, 61a. The tax is not contingent on arrest of the taxpayer or on seizure of illegal drugs from him. Instead, it is legally owed and payable by a "dealer" within 48 hours after a "dealer" comes into possession of more than 42.5 grams of marijuana, or seven or more grams of a controlled substance sold by weight, or 10 or more units of any other controlled substance.[2] N.C. GEN. STAT. §§ 105-113.106(3), 61a-62a; 105-

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[1] Unless otherwise indicated, the statutory provisions cited throughout this petition and set out in the appendix at pages 61a through 80a are those statutes in effect at the relevant times and applicable to respondent Lynn's case.

[2] A person who illegally possesses, delivers, sells or manufactures marijuana or other controlled substances in such quantities is defined for (continued...)

113.109, 63a-64a. The tax, referred to as a "drug tax," by law must be paid by a "dealer" by submitting the amount of the tax due to the Secretary of Revenue, along with a form prescribed by the Secretary. Upon payment of the tax, the taxpayer receives special stamps as evidence of payment. Significantly, the form[3] and tax may be submitted anonymously by mail or in person without providing any identifying information, such as name, address, or social security number. No information obtained in connection with voluntary payment of the tax may be used for prosecution of any criminal offense other than a violation of the drug tax statutes unless the information is separately obtained. The stamps must be attached to the drugs, and no further taxes are *ever* due, so long as the stamps remain affixed, regardless of how many times the drugs change possession. N.C. GEN. STAT. §§ 105-113.108,63a; 105-113.109, 63a-64a; 105-113.112 , 66a.

• Since the drug tax went into effect in 1990, the State of North Carolina has collected nearly forty million dollars ($40,000,000.00). That money has been distributed between the North Carolina General Fund (25%) and any law enforcement

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[2](...continued)
purposes of these excise taxes as a "dealer." N.C. GEN. STAT. § 105-113.106(3), 61a-62a.

[3] A copy of the form was attached to the petition for rehearing and suggestion for rehearing *in banc* filed with the court of appeals. Curiously, the court of appeals said that counsel for petitioners "admitted" in oral argument that there was no such form. *Lynn v. West*, 134 F.3d 582, 591 (4th Cir. 1998), 19a. In fact, the record before the court of appeals referred to the form's existence, and the form on its face was adopted "12-89," in readiness for the tax becoming effective in 1990.

agencies which seized drugs or performed investigations leading to the drug tax collections (75%). N.C. GEN. STAT. § 105-113.113, 66a-67a.[4]

This case arose from a March 1, 1993, search by state, federal and local government law enforcement agents at the Reidsville, North Carolina, home of respondent David Lynn, Jr. (hereafter "Lynn"), where 970 grams of powder cocaine were discovered. No tax-paid stamps were affixed to the cocaine. Lynn was convicted in the United States District Court for the Middle District of North Carolina of possession of a controlled substance with intent to distribute it. Also, in related proceedings, his house was forfeited to the United States. However, he was never prosecuted by the State of North Carolina for criminal drug charges based on the 970 grams of cocaine found in his possession.

Upon learning of Lynn's possession of non-tax paid cocaine, on March 1, 1993, the North Carolina Secretary of Revenue, issued a notice of tax assessment pursuant to N.C. GEN. STAT. § 105-113.111, 65a, for the unpaid taxes on the 970 grams of cocaine, plus interest and penalty. Pursuant to N.C. GEN. STAT. § 105-113.110A, 64a, the tax was assessed at a rate of $200.00 for each gram of cocaine. Lynn was also assessed

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[4] For now at least, this substantial source of revenue is no longer available to the State and its law enforcement agencies. Pending the outcome of this petition, the Secretary of Revenue has ceased collecting the tax, with an exception made for taxpayers filing a waiver of any claims based on *Lynn*'s reasoning.

a 100% penalty[5] specifically applicable to unpaid drug excise taxes, plus interest under the standard rates for unpaid North Carolina taxes. *See* N.C. GEN. STAT. § 105-113.110A,64a; *see also* N.C. GEN. STAT. §105-241.1(i),67a. The total assessment, including penalty and interest, amounted to $389,125.20.

In an effort to collect the taxes owed by Lynn, the Secretary of Revenue obtained a writ of execution directing the local sheriff to seize Lynn's personal property to satisfy the tax assessment. On March 18, 1993, before any property had been seized, Lynn invoked his civil administrative remedies by filing a timely objection to the Secretary's proposed assessment and requesting an administrative hearing pursuant to N.C. GEN. STAT. § 105-241.1, 67a-71a. However, after receiving an adverse ruling from a hearing officer, Lynn failed to appeal to the Tax Review Board and thus waived all further judicial review. *See* N.C. GEN. STAT. § 105-241.2, 72a-76a.

In a continued effort to collect the taxes owed by Lynn, petitioner Deborah West, a North Carolina Revenue Enforcement Officer, seized two cars originally purchased by Lynn. Respondent Robin Dixon Lynn, Lynn's wife at the time of the relevant proceedings, and respondent Rodney Lynn, Lynn's brother, claimed they owned the two cars at the time of their seizure. The Department also seized a commercial building in which respondent Roxanne Lynn, Lynn's ex-wife,

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[5] The statutory penalty was reduced in 1995 to 50%. N.C. GEN. STAT. § 105-113.107 (1995), 79a-80a.

claimed that she had an interest. Respondent David Lynn, Sr., also claimed he owned property taken from Lynn.

This action was brought by respondents on October 6, 1994, against petitioners, who are Enforcement Officer West, then Secretary of Revenue Faulkner, and the sovereign State of North Carolina. Respondents filed their suit in the United States District Court for the Middle District of North Carolina seeking declaratory and injunctive relief as well as compensatory damages pursuant to 42 U.S.C. § 1983. The district court, in a decision by the Honorable Carlton Tilley, dismissed the case on February 15, 1996. Judge Tilley concluded that the Eleventh Amendment barred the Lynns' claims against the State of North Carolina and their claims against petitioners West and Faulkner in their official capacities for deprivation of property without due process of law. The district court dismissed the claims against petitioner West in her individual capacity, which allege deprivation of property without due process of law, for failure to state a claim for which relief could be granted because North Carolina has constitutionally adequate post-deprivation remedies. The additional claims brought by Lynn himself challenged the drug tax as an unconstitutionally imposed penalty under the reasoning of *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994). The district court concluded that Lynn's challenge was barred by the Tax Injunction Act, 28 U.S.C. § 1341, so that the district court lacked jurisdiction to determine the question. *See* 47a-55a.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the district court's rulings as to the dismissal of the claims against petitioner West in her individual capacity, but did so on the grounds that respondents had failed to allege sufficient facts to support their claims. The court of appeals also affirmed the district court's Eleventh Amendment rulings. *See Lynn v. West*, 134 F.3d 582, 585-86 (1998), 5a-9a.

Where petitioners contend the court of appeals erred was in reversing the district court's dismissal of Lynn's claims against petitioners West and Faulkner in their official capacities. The court of appeals first reached out and concluded that the drug tax is in fact a criminal penalty, under this Court's ruling in *Kurth Ranch*, despite the striking differences between the North Carolina drug tax and the Montana drug tax at issue there. *Id.* at 589, 17a. Then, because the court of appeals had already concluded that the drug tax is in fact a criminal penalty, it reversed the district court's ruling that the Tax Injunction Act barred Lynn's claims. It based this ruling on the simplistic conclusion that the Tax Injunction Act does not apply to taxes that the court labels as criminal in nature. *Id.* at 594, 31a.

REASONS FOR GRANTING THE WRIT

The Court should grant its writ of certiorari because the court of appeals erroneously interpreted and applied this Court's decision in *Kurth Ranch* to hold that North Carolina's drug tax law is a criminal penalty which cannot be imposed without all the constitutional protections guaranteed by the Sixth Amendment to defendants in criminal proceedings. Under the reasoning of the court of appeals, no state could

constitutionally impose a tax on the possession of illegal drugs except as part of a full-scale criminal prosecution. For North Carolina, the court of appeals' decision is a devastating blow to the State's ability to assess a tax on the possession of illegal drugs and to collect the substantial revenue that the tax has provided since 1990. The decision also threatens numerous criminal convictions and criminal prosecutions for drug offenses which may be challenged on double jeopardy grounds by defendants who have paid the tax. Further, the decision raises the specter of civil litigation seeking refunds of millions of dollars of taxes previously collected. In order to wreak this havoc on North Carolina's drug tax law, the court of appeals ignored the significant differences between North Carolina's drug tax statute and the Montana tax in *Kurth Ranch*. In addition, the *Lynn* court paid little heed to the teachings of this Court's opinion in *Hudson v. United States*, __ U.S. ___, 118 S. Ct. 488 (1997), and its decision conflicts squarely with precedent from the North Carolina Supreme Court and Court of Appeals. Moreover, the court of appeals' decision is equally inconsistent with numerous decisions of other state courts interpreting and applying the *Kurth Ranch* decision to their own drug tax laws, each of which has features similar, if not identical to, the North Carolina statute. Finally, the court of appeals improperly decided this case by assuming jurisdiction over it contrary to the Tax Injunction Act, 28 U.S.C. § 1341, and numerous decisions of this Court.

I. THE COURT OF APPEALS ERRED IN INTERPRETING AND MISAPPLYING *KURTH RANCH* TO HOLD THAT NORTH CAROLINA'S DRUG TAX LAW IS A CRIMINAL PENALTY, CONTRARY TO THE DECISIONS OF NORTH CAROLINA'S APPELLATE COURTS AND THE DECISIONS OF OTHER STATE COURTS AS TO SIMILAR DRUG TAX LAWS.

A. THE COURT OF APPEALS' OPINION MISINTERPRETS *KURTH RANCH* CONTRARY TO OTHER DECISIONS OF THIS COURT IN SUCH A MANNER THAT NO DRUG TAX COULD EVER BE IMPOSED EXCEPT WITH THE FULL PANOPLY OF PROTECTIONS FOR CRIMINAL PROSECUTIONS.

The court of appeals erroneously interpreted and applied this Court's decision in *Kurth Ranch* to hold that North Carolina's excise tax on the possession of specified quantities of illegal drugs is a criminal penalty which requires the State to provide all the protections constitutionally mandated for criminal prosecutions. The reasoning of the court of appeals' opinion, if applied in other cases, would prevent any state from successfully imposing a tax on the possession of illegal drugs except through a criminal prosecution with all the protections guaranteed by the Sixth Amendment to the United States Constitution. The court of appeals' opinion is contrary to this Court's decision in *Kurth Ranch* and to the teachings of this Court in other cases regarding when a non-criminal statute can be treated as criminal in nature.

In *Kurth Ranch*, this Court held that Montana's Dangerous Drug Tax imposed on possession of marijuana was a criminal penalty within the meaning of the Double Jeopardy Clause. In reaching that conclusion, the Court cautioned that "[a]s a general matter, the unlawfulness of an activity does not prevent its taxation." *Kurth Ranch*, 511 U.S. at 778 (citations omitted). Similarly, "a high tax rate and deterrent purpose . . . do not necessarily render the tax punitive." *Id.* at 781 (citations omitted). Much more is required before a tax on the possession of drugs loses its intended character as a tax and becomes instead a criminal penalty. Two additional, "unusual features" of the Montana tax laws converted the tax in *Kurth Ranch* into a criminal penalty for double jeopardy purposes. It was those unusual features, this Court said, that "set the Montana statute apart from most taxes." *Id.* First, the Montana drug tax was imposed on the commission of a crime because it was not owed unless and until the taxpayer had been arrested for criminal possession of the drugs. *Id.* Second, as a corollary to the fact that the tax was never owed until after the taxpayer's arrest, the tax was imposed only after the drugs had been confiscated and thus were no longer in the taxpayer's possession. *Id.* at 783.

In *Lynn*, the court of appeals adopted a simplistic, but broad-ranging view of these "unusual features" causing it to conclude erroneously that the North Carolina drug tax is also a criminal penalty under the approach applied in *Kurth Ranch*. According to the court of appeals, the effect of the North Carolina drug tax is the same as in *Kurth Ranch* because the tax has rarely, if ever, been paid by anyone who has not been

arrested for drug crimes.[6] *Lynn*, 134 F.3d at 591, 21a. Moreover, in the eyes of the court of appeals, the North Carolina drug tax is also indistinguishable from the Montana tax in *Kurth Ranch* because the tax is ordinarily assessed only on persons who had no property right to the drugs and after the drugs have been confiscated. *Id.*

The court of appeals interprets *Kurth Ranch* in a manner that would transform all "drug taxes" into criminal penalties because drug dealers typically do not voluntarily pay their taxes while still in possession of the drugs. The court of appeals' opinion cannot be squared with this Court's characterization of the Montana tax as "unique" in being "conditioned on the commission of a crime and . . . imposed only after the taxpayer had been arrested: thus, only a person charged with a criminal offense was subject to the tax." *United States v. Ursery*, 518 U.S. 267, ___, 116 S. Ct. 2135, 2144 (1996). If the court of appeals' interpretation of *Kurth Ranch* was correct, there would have been no constitutional significance to the fact that the Montana tax, unlike the North Carolina tax, was not owed until after arrest for possession of drugs. Similarly, if the court of appeals' interpretation was correct, there would have been nothing noteworthy about the fact that the Montana taxpayer, unlike a North Carolina taxpayer, "did not own or possess the taxed marijuana at the

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[6] The court of appeals stated that counsel for North Carolina admitted in oral argument that the Secretary of Revenue had not issued a form for reporting and paying the tax. This statement is incorrect; the form has existed since 1989. *See* Statement of the Case, *supra* at 4 and n.2.

time the tax was imposed." *Id.* Montana's drug tax law would have been indistinguishable from all drug taxes if the failure to pay a tax owed at the time of possession is sufficient to convert the tax into one which is imposed only after the drugs have been confiscated. Evidently, the court of appeals concluded that failure to pay a tax until "caught" transforms the tax into one imposed only if and when the delinquent taxpayer is in fact "caught." In so doing, it equated the routine, constitutionally valid features of North Carolina's tax due on possession of drugs with the "unusual features" of the Montana tax under a theory which would make it impossible for any state to impose a drug tax outside of a criminal proceeding.

This case goes beyond *Kurth Ranch* because it does not raise a double jeopardy question. Because Lynn was never criminally prosecuted by North Carolina, the question before the court of appeals was simply whether the tax was constitutionally collected without the protections guaranteed by the Sixth Amendment for criminal prosecutions. In its decision the court of appeals cited the dissenting opinions in *Kurth Ranch* of Justices Scalia and O'Connor, pointing out that the full constitutional protections accorded criminal prosecutions would be required to impose a drug tax that was determined to be a criminal penalty in nature, regardless of whether double jeopardy issues came into play. In relying on these dissenting opinions, the court of appeals ignored the majority's statement in *Kurth Ranch* that

> Montana no doubt could collect its tax on the possession of marijuana, for example, if it had

> not previously punished the taxpayer for the same offense.

Kurth Ranch, 511 U.S. at 778. Moreover, the court of appeals made no effort to apply factors traditionally employed to determine whether particular legislation is "penal . . . in character." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963); *see also United States v. Ward*, 448 U.S. 242 (1980). Such standards still provide the proper measure of whether a civil statute is actually criminal in nature. *See Hudson*, 118 S. Ct. at 488. Indeed, the *Kurth Ranch* analysis can be characterized as an example of the Court's "appl[ying] a *Kennedy*-like test" to the peculiar features of the Montana drug tax procedures. *Hudson*, 118 S. Ct. at 495 n.6.

Applying the *Kennedy* and *Ward* standards to the North Carolina drug tax leads to the inescapable conclusion that the North Carolina drug tax is not a criminal penalty, contrary to the court of appeals' conclusion. *Compare Hill v. State*, 898 P.2d 155 (Okla. Crim. App. 1995) (applying a *Ward* and *Kennedy* analysis to the Oklahoma drug tax law, similar to North Carolina's, the court held the drug tax was not a penal statute). First, the tax does not involve an affirmative disability or restraint. The tax has not historically been regarded as a punishment. The tax obligation does not depend on a finding of *scienter*. It is true that the tax is imposed on conduct that is often criminal and does advance some of the traditional aims of deterrence and retribution, but these attributes are not fatal to the tax retaining its character as a tax instead of a criminal penalty. *See Hudson*, 118 S. Ct. at 495-96. Most importantly,

the tax is imposed as part of the North Carolina tax laws and administered by the North Carolina Secretary of Revenue in a manner utterly consistent with North Carolina's tax practices. Ultimately, "only the clearest proof" can negate the plain legislative intent to impose a tax and convert the tax into a criminal penalty. *See Ward*, 448 U.S. at 249; *accord Hudson*, 118 S. Ct. at 493. Contrary to the court of appeals' facile conclusion in *Lynn*,[7] that proof is utterly lacking. Consequently, this Court should grant its writ of certiorari and reverse the court of appeals' erroneous application of *Kurth Ranch* to the North Carolina drug tax despite the fact that the tax is not a criminal penalty under the well-established tests set out in *Ward* and *Kennedy* and reaffirmed in *Hudson*.

B. THE COURT OF APPEALS' DECISION CONFLICTS SQUARELY WITH DECISIONS OF NORTH CAROLINA'S APPELLATE COURTS HOLDING THAT THE DRUG TAX IS NOT A CRIMINAL PENALTY.

Not only is the court of appeals' opinion inconsistent with this Court's decisions in *Kurth Ranch* and *Hudson*, but it is also squarely in conflict with decisions of North Carolina's highest courts. North Carolina's drug tax has twice been reviewed by the North Carolina Court of Appeals and the North

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[7] *Lynn* relegated all consideration of *Hudson* to a footnote, summarily concluding that the requirement of the "clearest proof" to overcome the legislative intent of a civil sanction "does not appear to make the challenger's burden any tougher than it already was." *Lynn*, 134 F.3d at 592 n.10, 26a n.10.

Carolina Supreme Court. Each time, the tax was held not to constitute a criminal penalty. In *State v. Ballenger*, 472 S.E.2d 572 (N.C. Ct. App. 1996), *aff'd per curiam*, 481 S.E.2d 84 (N.C.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 68 (1997), the North Carolina Court of Appeals rejected the argument that the drug tax was a criminal penalty subject to double jeopardy analysis within the meaning of *Kurth Ranch*. The defendant in *Ballenger*, who was facing criminal charges for possession of marijuana with intent to sell or deliver, claimed he had already been placed in jeopardy by payment of a drug tax assessed against him for possession of the same marijuana.

In rejecting Ballenger's double jeopardy argument, the North Carolina Court of Appeals recognized that this State's drug tax, like the Montana tax, imposes an admittedly high rate of tax[8] and serves a deterrent purpose, at least in part. It

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[8] Of course, North Carolina's drug tax rate is nowhere near as high as the exaggerated rate attributed to it by the court of appeals. In reaching its decision, the court of appeals apparently felt compelled to ascribe a value to Lynn's cocaine, as "[t]he parties in this case have not estimated the market value of the" 970 grams of powder cocaine seized from Lynn. *Lynn*, 134 F.3d at 589-90, 18a. Venturing far outside the record of the case, which was before it on appeal from the granting of a motion to dismiss, the court of appeals consulted selected cases and asserted that Lynn's cocaine was worth "about $25,000." *Id.* at 590, 18a. Had the court of appeals so chosen, it could have relied on other cases, which would have led to a far higher valuation of the cocaine. *See United States v. Allen*, No. 86-5137, 842 F.2d 1292 (Table), 1988 WL 25273 (4th Cir. Mar. 23, 1988) (in which 193.48 grams of 73% pure cocaine was estimated to have a street value potentially more than $90,000); *United States v. Goff*, 907 F.2d 1441, 1443 (4th Cir. 1990) (in which the street value of 249 grams of cocaine was estimated at $297.00 per gram, or $73,953.00).

nevertheless held that the drug tax was not a penalty because the tax does not encompass either of the two unusual features which doomed the Montana tax. First, the Montana tax was not merely conditioned on criminal conduct; it was never owed unless and until the possessor of the drugs was arrested. Secondly, because the Montana tax was not imposed until after the defendant was arrested and the drugs confiscated, the tax was imposed on drugs neither lawfully owned nor possessed by the taxpayer/defendant at the time the tax became due. *Kurth Ranch*, 511 U.S. at 783, *cited in Ballenger*, 472 S.E.2d at 574. In contrast, the North Carolina tax, due and owing within forty-eight (48) hours of possession,

> is not predicated upon whether the taxpayer in possession of the controlled substance has been arrested or charged with criminal conduct, nor is it assessed on property that necessarily has been confiscated or destroyed.

Ballenger, 472 S.E.2d at 574. Consequently, the North Carolina Court of Appeals concluded in *Ballenger*, and the North Carolina Supreme Court affirmed, that the North Carolina drug tax

> is a legitimate and remedial effort to recover revenue from those persons who would otherwise escape taxation when engaging in the highly profitable, but illicit and sometimes deadly activity of possessing, delivering, selling or manufacturing large quantities of controlled drugs.

Ballenger, 472 S.E.2d at 575. *See also State v. Creason*, 473 S.E.2d 771, 772 (N.C. Ct. App. 1996), *aff'd per curiam*, 484 S.E.2d 525 (N.C. 1997) (applying *Ballenger*).

The opinion of the United States Court of Appeals for the Fourth Circuit is both squarely in conflict with decisions of the North Carolina appellate courts and contrary to this Court's emphasis in *Kurth Ranch* on the significance of the "unusual features" of the Montana drug tax.

The effect of the court of appeals' opinion is to create a sort of drug tax "Catch-22" for North Carolina. The court of appeals held that "North Carolina's enforcement scheme must provide the constitutional safeguards that attach to criminal prosecutions." *Lynn*, 134 F.3d at 595, 34a. At the same time, it elected not to enter an injunction because there was no "indication that North Carolina will not comply with this opinion in the future." *Id.* Although North Carolina is not now collecting additional drug tax money, in deference to the court of appeals' opinion, numerous criminal cases inevitably exist in which defendants have not exhausted their appeals or may still petition for habeas corpus relief, asserting double jeopardy claims on the theory that payment of the drug tax precluded their subsequent criminal convictions for drug offenses. Moreover, the State is also faced with the threat of civil actions to recover millions of dollars of drug taxes that already have been collected. The North Carolina courts, in theory, are bound not by the decision of the court of appeals in this case, but by the decisions of the State's highest courts, which have held that

the drug tax is not a criminal penalty. *Cf. Arizonans for Official English v. Arizona*, 520 U.S. ___, ___ n.11, 117 S. Ct. 1055, 1064 n.11 (1997). Thus, the same tax is a criminal penalty unconstitutionally imposed in federal court and a valid tax properly imposed in state court. Measuring identical conduct by diametrically opposite principles strikes at the heart of federalism and produces ongoing chaos and perpetual uncertainty for the State.

This Court should grant its writ of certiorari to review and reverse the decision of the court of appeals because it is in direct conflict with decisions of the highest courts of North Carolina and because it misinterprets and misapplies this Court's decision in *Kurth Ranch*.

C. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF OTHER STATE COURTS HOLDING THAT DRUG TAX LAWS SIMILAR TO NORTH CAROLINA'S ARE NOT CRIMINAL PENALTIES.

In stark contrast to the court of appeals' decision in *Lynn*, other states' drug tax statutes similar to North Carolina's have repeatedly been held not to be criminal penalties. Most striking is the decision of the Connecticut Supreme Court in *Covelli v. Commissioner of Revenue Servs.* ("*Covelli I*"), 668 A.2d 699 (Conn. 1995), *vacated and remanded sub nom. Covelli v. Crystal*, ___ U.S. ___, 116 S. Ct. 2577 (for further consideration in light of this Court's decision in *United States v. Ursery*, 518 U.S. ___, 116 S. Ct. 2135 (1996)), *aff'd per*

curiam on reconsideration, *Covelli v. Commissioner of Revenue Servs.* ("*Covelli II*"), 683 A.2d 737 (Conn. 1996), *cert. denied*, *Covelli v. Crystal*, ___ U.S. ___, 117 S. Ct. 1445 (1997).

In *Covelli I* the Connecticut Supreme Court distinguished *Kurth Ranch* on the basis of features contained in the Connecticut drug tax statute that are also present in the North Carolina statute. Specifically, because the Connecticut tax is also owed on possession of a specified quantity of drugs, "Connecticut's tax is neither predicated upon arrest nor is it assessed on property that necessarily has been confiscated or destroyed." *Covelli I*, 668 A.2d at 705. Rejecting the type of superficial analysis employed by the court of appeals in this case, the *Covelli* court refused to treat the drug tax as synonymous with the Montana tax in *Kurth Ranch* merely because most persons in possession of drugs fail to pay the tax when due.

> We acknowledge that in many, if not most, cases Connecticut's tax will not be imposed until the taxpayer has been arrested and until the illegal drugs have been confiscated or destroyed. The practicalities surrounding the imposition of the tax, however, merely reflect the reality of attempting to tax an illegal activity. The taxpayer's voluntary choice to ignore his or her tax obligations should not be the determinative factor in evaluating whether Connecticut's tax constitutes punishment in the double jeopardy context. . . . It would be anomalous indeed if persons conducting an

> illegal business were excused from the payment of a tax on that business because the failure to pay the tax was not discovered, as a result of their own dereliction, until after they had been arrested and double jeopardy protection attached.

Covelli I, 668 A.2d at 706 (citations omitted). The court of appeals failed to recognize the very real difference between a tax such as the one in *Kurth Ranch*, which is not owed until after arrest and seizure of the drugs, and a tax such as Connecticut's and North Carolina's, which is owed shortly after coming into possession of a specified quantity of drugs. Because the North Carolina and Connecticut taxes can be paid anonymously in exchange for stamps to be affixed to the drugs, the only reason the taxes are typically paid after arrest and seizure of the drugs is the taxpayers' defiance of the tax statutes. Clearly, the *Lynn* decision is squarely in conflict with the decision of the Connecticut Supreme Court in *Covelli*, a decision which this Court has allowed to stand, permitting Connecticut to continue enforcing its drug tax without affording all the procedural protections of criminal prosecutions and without running the risk of double jeopardy claims. North Carolina should similarly be allowed to enforce its drug tax, which falls squarely within the analysis of the Connecticut Supreme Court in *Covelli I*.[9]

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[9] The North Carolina Court of Appeals' analysis in *Ballenger* and *Creason* is entirely consistent with the Connecticut analysis in *Covelli I*. Moreover, the Connecticut and North Carolina statutes both imposed taxes

(continued...)

Like Connecticut, the courts of several other states with statutes similar to North Carolina's have determined that their drug taxes are not criminal penalties within the meaning of the *Kurth Ranch* decision. These states include Alabama, which has held that its drug tax on possession of specified quantities of drugs is distinguishable from the Montana tax in *Kurth Ranch* because it is levied on possession of the drugs and is an excise tax on the dealer rather than a tax on the confiscated drugs. *Milner v. State*, 658 So. 2d 500 (Ala. Civ. App. 1994), *cert. denied* (Ala. 1995); *see also S.H.J. v. State Dep't of Revenue*, 682 So. 2d 1354 (Ala. Civ. App. 1995), *cert. denied*, (Ala. 1996) (drug tax imposed for marijuana possession and ultimately imposed after criminal conviction for possession of marijuana did not violate Double Jeopardy Clause); *Wilhite v. State*, 689 So. 2d 221 (Ala. Crim. App. 1996), *cert. denied*, (Ala. 1997) (drug tax on possession of marijuana not criminal penalty and therefore does not place person already prosecuted for trafficking in marijuana in double jeopardy for same offense).

Similarly, the Iowa Supreme Court has ruled that its drug tax does not constitute a criminal penalty. *State v. Lange*, 531 N.W.2d 108 (Iowa 1995). *Lange* involved a double jeopardy challenge to a conviction, after the tax had been paid, for the crime of failure to pay the drug tax when owed. Like

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[9](...continued)
at the rate of two hundred dollars ($200.00) per gram of cocaine. The taxpayer in *Covelli* owed $255,631 in taxes on 1250 grams of cocaine, plus a 100% penalty, plus interest of $41,540.04. *See Covelli I*, 668 A.2d at 702.

North Carolina's drug tax, the Iowa tax is owed on possession, manufacture, or similar acts, and the tax obligation is not conditioned upon the taxpayer's arrest or upon seizure of the drugs. The Iowa Supreme Court analyzed the issue much like the North Carolina, Connecticut, and Alabama courts. In addition, it pointed out that the drug tax obligation is not co-extensive with the crime of illegal possession of the drugs in question because the tax only comes into play at certain thresholds even though possession of any amount of the drug is illegal.[10] Iowa's drug tax "is therefore not conditioned on the commission of a crime. Nor is it exacted only after the taxpayer is arrested." *Lange*, 531 N.W.2d at 116. Moreover, because it is imposed immediately upon possession or other triggering action, "[t]he Iowa tax, therefore, is not -- like the Montana tax -- imposed on goods a taxpayer neither owns nor possesses." *Id.* at 117. Thus, Iowa's reasoning was very much like that of the other state courts that have held their drug taxes were not criminal penalties, reasoning which is wholly inconsistent with that of the court of appeals in *Lynn*.

Still other state courts have also held that their drug tax statutes do not constitute criminal penalties because the taxes, all very similar to North Carolina's, are distinguishable from the tax statutes analyzed in *Kurth Ranch*. These include Kansas, which has a drug tax payable upon acquisition or

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[10] North Carolina's statute, like most such statutes, also imposes the drug tax only on possession of *specified* quantities of these drugs even though possession of smaller amounts would also be unlawful. *See* N.C. GEN. STAT. § 105-113.106, 61a-62a.

possession of marijuana and provides for the confidential purchase of stamps to affix to the drugs to signify payment of the tax. The Kansas Supreme Court relied on and followed the Alabama and Iowa decisions in determining that its drug tax law is distinguishable from Montana's because it lacks the two "unusual features" emphasized in *Kurth Ranch*. *See State v. Gulledge*, 896 P.2d 378 (Kan. 1995). Similar reasoning was also employed by the South Carolina Supreme Court in holding that its drug tax statute, providing for purchase of drug tax stamps at the rate of $200 per gram for substances such as cocaine, was not a criminal penalty and therefore did not trigger a double jeopardy analysis. *McMullin v. South Carolina Dep't of Revenue and Taxation*, 469 S.E.2d 600 (S.C. 1996). *See also Hill*, 898 P.2d 155 (holding that drug tax statute is not a criminal penalty).

Plainly, the court of appeals' decision in *Lynn* stands in stark contrast to numerous state appellate courts' decisions holding that similar drug tax statutes are distinguishable from the Montana tax analyzed in *Kurth Ranch* and therefore are not criminal penalties. While some state courts have held since *Kurth Ranch* that their drug tax statutes are penalties, most are clearly distinguishable from the statutes at issue in this case and from those held not to be criminal penalties in Connecticut, Alabama, Iowa, Oklahoma, Kansas, and South Carolina. For example, the Illinois Supreme Court concluded that its drug tax statute is written in such a way that a criminal conviction for a drug offense is necessary before one can determine that the drug tax applies. *Wilson v. Department of Revenue*, 662 N.E.2d

415 (Ill. 1996). Colorado's drug tax statute was determined to be a penalty because, unlike those of North Carolina, Connecticut, and other states, the Colorado statute did not provide for confidential or anonymous payment of the tax with insulation from criminal prosecutions other than for non-payment of the tax. *People v. Maurello*, 932 P.2d 851 (Colo. Ct. App. 1997). Indiana's drug tax, although evidenced by affixing tax-paid stamps, required that the tax be paid every 48 hours and taxed marijuana at a rate that the Indiana Supreme Court determined to be eight times the rate in *Kurth Ranch*. *Bryant v. State*, 660 N.E.2d 290 (Ind. 1995), *cert. denied*, ___ U.S. ___, 117 S. Ct. 293 (1996). The Texas Court of Criminal Appeals has held that, because of features similar to those of the North Carolina statute, it "might be inclined to find that the Texas system of controlled substances taxation . . . is not a punishment." *Stennett v. State*, 941 S.W.2d 914, 916 (Tex. Crim. App. 1996). However, fatal to that inclination was the fact that the legislative history showed that "the Texas tax was plainly and undoubtedly intended to be a punishment by the legislature that enacted it." *Id.*; *accord Ex parte Ward*, No. 420-96, 421-96, 1998 WL 18063 (Tex. Crim. App. Jan. 21, 1998). Finally, the Nevada Supreme Court held that its drug tax constituted a criminal penalty in *Desimone v. State*, 904 P.2d 1 (Nev. 1995), *vacated* __ U.S. ___, 116 S. Ct. 2576 (1996). This Court vacated for further consideration in light of *Ursery*, and no decision has been issued on remand. Plainly, most decisions since *Kurth Ranch* which have held state drug tax laws to be criminal penalties involve statutes distinguishable in significant respects from North Carolina's

statute. *But see Brunner v. Collection Div. of Utah State Tax Comm'n*, 945 P.2d 687 (Utah 1997). *See also New Mexico Taxation and Revenue Dep't v. Whitener*, 869 P.2d 829 (N.M. Ct. App. 1993) (in a decision filed before this Court's *Kurth Ranch* decision, the New Mexico Court of Appeals applied a proportionality test in evaluating its tax, relying on *United States v. Halper*, 490 U.S. 435 (1989)).

This Court should grant its writ of certiorari to resolve the conflict that exists between *Lynn* and the decisions of state courts such as Connecticut, Alabama, South Carolina, Iowa, Kansas, and Oklahoma which have held that drug tax statutes similar to North Carolina's in all critical respects are not criminal penalties. The majority of courts addressing drug tax statutes like North Carolina's in light of the *Kurth Ranch* opinion have recognized the important distinctions between the Montana statute and statutes which impose a tax upon possession and which allow for confidential payment of the tax. Because the court of appeals did not recognize these important distinctions in *Lynn*, it reached its decision erroneously and has denied to North Carolina the opportunity to collect drug taxes in contrast to those other states. Accordingly, the Court should grant its writ of certiorari and reverse the court of appeals' erroneous decision.

II. THE COURT OF APPEALS ERRONEOUSLY ASSUMED JURISDICTION CONTRARY TO THE TAX INJUNCTION ACT, 28 U.S.C. § 1341, AND NUMEROUS DECISIONS OF THIS COURT.

The court of appeals' decision in *Lynn* is contrary to law and to numerous decisions of this Court because it assumes jurisdiction in contravention of the Tax Injunction Act, 28 U.S.C. § 1341. As the court acknowledged, the Tax Injunction Act prohibits the assumption of jurisdiction by federal courts to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State. 28 U.S.C. § 1341." *Lynn*, 134 F.3d at 594, 30a-31a. As interpreted and applied by this Court, the Tax Injunction Act also prohibits declaratory judgments holding state tax laws unconstitutional. *E.g*, *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982). Indeed, even suits against state officials for damages are barred by the Tax Injunction Act or the closely-associated principle of comity. *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 116 (1981). More basically, "the Tax Injunction Act reflects the congressional concern with *federal* court interference with state taxation" and "may be best understood as but a partial codification of the federal reluctance to interfere with state taxation." *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 590 (1995). In *Lynn*, the court of appeals showed no such reluctance to interfere with North Carolina's excise tax on controlled substances.

The court of appeals never considered whether North Carolina in fact provided respondent Lynn with a "plain, speedy and efficient remedy" to challenge the validity of the application of the drug tax to him. Instead, it built upon its facile conclusion that the drug tax is a criminal penalty within the meaning of *Kurth Ranch* to hold also that the Tax Injunction Act is inapplicable. In so doing, it relied upon precedent of only dubious applicability: *Steffel v. Thompson*, 415 U.S. 452 (1974), which addressed the propriety of a declaratory judgment concerning a threatened prosecution under state criminal provisions, never implicating the Tax Injunction Act; *Denton v. City of Carrollton, Ga.*, 235 F.2d 481 (5th Cir. 1956), which focused on the "doubtful" remedy of Georgia's tax refund provision; *Lipke v. Lederer*, 259 U.S. 557 (1922), dealing with a Prohibition era purported tax on liquor which was actually a pure penalty; *Regal Drug Corp. v. Wardell*, 260 U.S. 386 (1922) (same).

The vice of the court of appeals' approach is that it defies the purpose of the Tax Injunction Act. The court of appeals never afforded the State the opportunity to plan and provide for the possibility of a challenge to the drug tax. Nor did it require respondent *Lynn* to take advantage of the "plain, speedy and efficient" remedies which North Carolina afforded him to challenge the drug tax. In fact, a drug tax assessment may be challenged in two ways. First, under N.C. GEN. STAT. § 105-267, 76a, Lynn could have paid the tax, and then "protested" or demanded a refund within thirty (30) days of payment. If the Secretary of Revenue denied the demand or

failed to act on it for ninety (90) days, Lynn then would have had three years to bring suit. This procedure has been repeatedly upheld in recent years in the face of due process challenges. *See Bailey v. State*, 412 S.E.2d 295 (N.C. 1991), *cert. denied*, 504 U.S. 911 (1992); *Swanson v. State*, 441 S.E.2d 537, 541, *cert. denied*, 513 U.S. 1056 (1994) ("*Swanson III*"). In fact, this Court recently cited to N.C. GEN. STAT. § 105-267 in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), commenting that, on remand of that case, the North Carolina Supreme Court should consider whether the plaintiff "has properly complied with the procedural requirements of North Carolina's tax refund statute, § 105-267." *Id.* at 347. Thus, N.C. GEN. STAT. § 105-267, 76a offered respondent Lynn a constitutionally adequate remedy which, if examined under the standards of the Tax Injunction Act, also qualifies as "plain, speedy and efficient," thus barring the declaratory relief granted in this case. Secondly, respondent Lynn could have pursued the administrative remedies that he initially invoked. Although he filed a timely objection to the Secretary's proposed assessment and requested an administrative hearing pursuant to N.C. GEN. STAT. § 105-241.1, 67a-71a, he chose not to appeal to the Tax Review Board from the adverse ruling of the hearing officer, thereby waiving all further judicial review. N.C. GEN. STAT. § 105-241.2, 72a-76a. Because this procedure equally qualifies as a "plain, speedy and efficient" remedy for purposes of the Tax Injunction Act, respondent Lynn should have not have been allowed to start all over to challenge the tax in federal court after abandoning his state remedy.

The court of appeals stretched to reach the question of the nature of North Carolina's drug tax statute, "riding roughshod" over the Tax Injunction Act to issue a declaratory judgment in a case in which no monetary remedy was awarded, no double jeopardy issue was involved, and no injunctive relief was provided[11]. This Court should grant its writ of certiorari to review and reverse the court of appeals' unwarranted assumption of jurisdiction over this case in order to render North Carolina's drug tax useless as a supposed criminal penalty that can only be imposed subject to the full constitutional protections of criminal prosecutions.

CONCLUSION

This Court should grant its writ of certiorari and reverse the court of appeals' erroneous ruling that North Carolina's excise tax on possession of large quantities of unlawful drugs is a criminal penalty, a conclusion contrary to numerous decisions of this Court, to decisions of North Carolina's appellate courts reviewing the same tax statutes, and to decisions of numerous other state courts reviewing statutes

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[11] Monetary relief from the State itself and the individual defendants in their official capacities was, of course, barred by the Eleventh Amendment, as acknowledged by the court of appeals. *Lynn*, 134 F.3d at 587, 11a. Under the circumstances of this case, the court of appeals' opinion served no purpose except to provide respondent Lynn with a judgment which he could wave in the face of state officials and state courts, if need be. Consequently, the court of appeals should not have issued even the declaratory judgment in this case; doing so itself infringed upon North Carolina's Eleventh Amendment immunity. *See Green v. Mansour*, 474 U.S. 64 (1985).

similar to North Carolina's. In addition, this Court should grant its writ of certiorari and reverse the court of appeals' erroneous assumption of jurisdiction contrary to the Tax Injunction Act, 28 U.S.C. § 1341, and numerous decisions of this Court applying the Act.

Respectfully submitted,

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May 11, 1998

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PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DECIDED JANUARY 13, 1998

[Caption Omitted in Printing]

OPINION

MICHAEL, Circuit Judge:

The main question in this case is whether a North Carolina tax on illegal drugs is in reality a criminal penalty. North Carolina's Controlled Substance Tax (Drug Tax), N.C. Gen. Stat. §§ 105-113.105 through 105-113.113, imposes a special excise tax on "dealers" who illegally possess a sufficient quantity of a "controlled substance," as that term is defined in the state criminal code. The statute requires drug dealers to submit a form reporting their illegal possession and to pay the tax. In return, dealers are supposed to receive stamps to affix to the drugs before they are resold. Payment of the Drug Tax does not make possession or resale legal, however. It should come as no surprise that no drug dealer has ever filed a form and voluntarily paid this tax.

In 1993 North Carolina assessed a $390,000 tax liability against David Lynn, Jr. (Lynn) under the Drug Tax. Lynn and certain of his relatives filed a lawsuit against the state and two of its tax officials in the United States District Court for the Middle District of North Carolina challenging the constitutionality of the tax and alleging civil rights violations under 42 U.S.C. § 1983. The heart of the complaint is that the

Drug Tax is a criminal penalty, not a tax. The district court properly dismissed part of the complaint for failure to state a claim and on the grounds of Eleventh Amendment immunity, but it erred in concluding that the Drug Tax is a true tax. This error led the court to invoke the Tax Injunction Act, 28 U.S.C. § 1341, and dismiss the claims for declaratory and injunctive relief. We hold that the Drug Tax is in reality a criminal penalty under *Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994). Because the tax is a criminal penalty, federal court jurisdiction is not barred by the Tax Injunction Act. We further hold that the Drug Tax, like any other criminal penalty, cannot be enforced without the constitutional safeguards that accompany criminal proceedings. We therefore affirm the district court in part and reverse in part.

I.

On March 1, 1993, state law enforcement agents obtained a warrant to search Lynn's residence in Reidsville, North Carolina. When both state and federal agents executed the warrant later that day, they discovered 970 grams of cocaine. Lynn was thereafter convicted on federal drug charges in the United States District Court for the Middle District of North Carolina. In that same proceeding the United States also obtained an order of forfeiture for Lynn's house and furniture under the corresponding criminal forfeiture statute, 21 U.S.C. § 853.

The cocaine seized at Lynn's house on March 1, 1993, was worth about $25,000. On March 2, 1993, after receiving notice of the seizure from the Sheriff of Rockingham County, the North Carolina Department of Revenue assessed a $389,125.20 Drug Tax liability against Lynn for unpaid taxes, penalties, and interest. According to the Department, Lynn owed a tax of $200 per gram on the 970 grams of cocaine taken from his house ($194,000), plus a 100% penalty for failure to pay the tax on time ($194,000), plus interest ($1,125.20). On March 4, 1993, Janice Faulkner, the North Carolina Secretary of Revenue, filed a Certificate of Tax Liability with the clerk of the Superior Court of Rockingham County, where Lynn resided. *See* N.C. Gen. Stat. § 105-242(c)(1996). On the same day the Department of Revenue obtained a writ of execution in Rockingham County, directing the sheriff to seize Lynn's personal property in order to satisfy the $389,000 assessment.

Around March 18, 1993, Lynn filed an objection to the assessment with the Department of Revenue and requested an administrative hearing under N.C. Gen. Stat. § 105-241.1. The administrative hearing was held on March 15, 1994, before an Assistant Secretary of Revenue. The Assistant Secretary issued his decision on May 9, 1994, sustaining the assessment and declaring it "to be final and immediately due and collectible." Lynn did not petition for a review of the Assistant Secretary's decision before the Tax Review Board. *See* N.C. Gen. Stat. § 105-241.2 (1996). In the meantime, on April 12, 1994 the Sheriff of Rockingham County (in an effort to collect the assessment) had already seized some items of Lynn's personal

property, including televisions and VCRs, stereo and Nintendo equipment, a grandfather clock, and an oak cabinet.

The Revenue Department assigned further responsibility for collection of the Drug Tax assessment against Lynn to Deborah West, a Revenue Enforcement Officer in the Controlled Substance Tax Division of the Department.[1] In an effort to collect, West (in July and August 1994) seized two cars originally purchased by Lynn, a 1992 Mitsubishi 3000GT and a 1976 Mercedes Benz 450SL. Robin Dixon Lynn, Lynn's current wife, claims that a contract she and Lynn signed in February 1993 gave her sole ownership of the Mitsubishi before it was seized by West. Rodney Lynn, who is Lynn's brother, claims that he owned the Mercedes when it was seized. The Department of Revenue also seized (and sold at public auction) a commercial building belonging to Lynn. Roxanne Lynn, Lynn's ex-wife, claims an interest in that building under a judgment lien from her divorce case against Lynn. Lynn's father, David Lynn, Sr., claims that he owns some of the seized property, presumably certain of the personal items taken by the sheriff.

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[1] *See* N.C. Gen. Stat. § 105-242(a)(2) (1996) ("The Secretary may issue a warrant. . . to any revenue officer or other employee of the Department of Revenue charged with the duty to collect taxes, commanding the officer or employee to levy upon and sell the taxpayer's personal property . . . .").

In October 1994 Lynn, along with his relatives and ex-wife mentioned above, went to federal court to try to block North Carolina from collecting the Drug Tax assessment. They sued the state, Enforcement Officer West, and Secretary Faulkner, seeking compensatory damages under 42 U.S.C. § 1983 for various constitutional violations. They also sought declaratory and injunctive relief on the grounds that under *Department of Revenue v. Kurth Ranch,* 511 U.S. 767 (1994), further enforcement of the Drug Tax would violate the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. The district court dismissed the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6) and for lack of subject matter jurisdiction under Rule 12(b)(1). The district court concluded that (1) West, in her individual capacity, was entitled to qualified immunity, (2) North Carolina was immune from suit under the Eleventh Amendment, (3) West and Faulkner were entitled to Eleventh Amendment immunity on the claims for damages against them in their official capacities, and (4) the Tax Injunction Act, 28 U.S.C. § 1341, precluded subject matter jurisdiction over Lynn's claims for declaratory and injunctive relief. Lynn and the other plaintiffs appeal.

II.

Roxanne Lynn, David Lynn, Sr., Robin Dixon Lynn, and Rodney Lynn (the relatives) allege that West, a Revenue Enforcement Officer, is liable for damages in her individual capacity because she afforded them no due process before

seizing their property to satisfy a tax assessment against someone else. The relatives argue that West acted outside her lawful authority and "is not protected by Qualified Immunity [because] her actions were not justified under state law and were patently unreasonable under the circumstances of this case." Br. of Appellants at 12. The district court held that West is protected by qualified immunity and dismissed the § 1983 claims brought against her in her individual capacity for failure to state a claim. We review a dismissal for failure to state a claim de novo, construing the factual allegations in the light most favorable to the plaintiffs. *See Biggs v. Meadows*, 66 F.3d 569, 59 (4th Cir. 1995).

We agree that the complaint fails to state a claim against West in her individual capacity. On West's motion to dismiss in district court the parties fully developed their arguments on whether the relatives' complaint states a claim for deprivation of a property interest under state law. These arguments, which are repeated to us, make clear that we do not need to reach the immunity question. Even accepting the facts as alleged, and drawing all reasonable inferences in favor of the relatives, the complaint does not indicate that West deprived them of any of their property. As we will explain, the allegations of one of the relatives reveal that her interest was not affected by anything that West did. The other three do not allege anything to establish that they had an ownership interest in any of the property seized. Because the relatives cannot identify a property interest affected, they have not stated a claim under the Due Process Clause, and we need not consider

whether the doctrine of qualified immunity applies to the claim. *See DiMeglio v. Haines,* 45 F.3d 790, 799 (4th Cir. 1995) (noting that claims directed at public officials may sometimes be dismissed at the pleading stage without considering immunity because "it may be readily apparent on the face of the plaintiff's complaint that, even accepting the facts as he alleges them to be, he cannot possibly prevail on the merits of his claim under current law"); *See also Dunbar Corp. v. Lindsey,* 905 F.2d 754, 759 (4th Cir. 1990) (analyzing *Bivens* action by first asking whether plaintiff has a property right under state law).

First, Roxanne Lynn complains that West violated her property rights by arranging for the sale of David Lynn, Jr.'s commercial building. The allegations in the complaint, however, do not permit any reasonable inference that the sale affected her interest in the property. When she divorced Lynn in 1990, Roxanne Lynn was awarded a judgment against Lynn that, among other things, required him to pay her a certain sum. Roxanne Lynn alleges that the judgment (which is recorded) operates to give her a lien against Lynn's property, including the commercial building. *See* N.C. Gen. Stat. § 1-234 (1996) ("[A] judgment . . . is a lien on the real property in the county where the same is docketed . . . ."). Under North Carolina law the Revenue Department's execution sale did not interfere with any interest Roxanne Lynn had as a lienholder; the sale was

made subject to duly recorded prior liens.[2] As a result, the buyer took the property subject to her lien. Because her interest in the building was preserved, she has no claim that West took any steps to deprive her of her property.

Second, David Lynn, Sr. claims that West caused some of his property to be seized, but he has not identified the items of property that allegedly belong to him. We can only assume, by process of elimination, that he is referring to some of the televisions, VCRs, stereo equipment, or other personal items taken from his son, the subject of the Drug Tax assessment. Our assumption is not enough. Lynn, Sr.'s conclusory allegation that West seized his (unidentified) belongings fails to state a claim for deprivation of property.

Lastly, Robin Dixon Lynn and Rodney Lynn each claim that they own one of the cars seized by West. Robin Dixon Lynn's allegations regarding the 1992 Mitsubishi, however, do not reveal that she is the owner of record. David Lynn, Jr. bought the car in the name of Lynn's Auto Sales in September 1992. In February 1993 Lynn and Robin Dixon (who was then engaged to Lynn) agreed in writing that Robin would own the

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[2] *See* N.C. Gen. Stat. § 105-241(d)(1996) ("A tax lien . . . is not enforceable against . . . the holder of a duly recorded lien unless: (1) In the case of real property, a certificate of tax liability or a judgment was *first* docketed . . . . The priority of these claims and liens is determined by the date and time of recording, docketing, levy, or bona fide purchase.") (emphasis added).

Mitsubishi. But the agreement (attached to the complaint) states that title would not be placed in her name until she began making payments on the car. Nothing in the pleadings suggests that Robin Dixon Lynn ever began making payments or received title to the car. Under North Carolina law ownership of a car does not change hands until the certificate of title has been assigned and the new owner makes application for a new title. *See Nationwide Mut. Ins. Co. v. Hayes,* 174 S.E.2d 511, 517 (N.C. 1970); N.C. Gen. Stat. § 20-72 (1996). Therefore, Robin Dixon Lynn has not alleged anything to show that she had title to the Mitsubishi under North Carolina law. *See Dunbar Corp.,* 905 F.2d at 760 (noting that "North Carolina law determines whether [the plaintiff] has any property rights protected by the Fifth Amendment's Due Process Clause.") Similarly, Rodney Lynn claims that he owns the 1976 Mercedes, but his claim of ownership also falls short. In 1989 David Lynn, Jr. bought the Mercedes and registered it in his own name. In the face of this fact Rodney Lynn does not indicate when and how record title was transferred to him.

In sum, we conclude that none of the relatives has alleged anything to show that he or she has any property rights under state law that were affected by West's actions. Accordingly, we affirm the district court's conclusion that the relatives have failed to state a claim against West in her personal capacity.

III.

Lynn, the central plaintiff, seeks monetary and prospective relief from Enforcement Officer West and Secretary Faulkner in their official capacities and from the State of North Carolina itself. All three defendants claim immunity under the Eleventh Amendment. The district court concluded that the Eleventh Amendment protects North Carolina from all claims "and bars the[ ] official-capacity claims [for monetary relief] against [ ] West and Faulkner." However, the court recognized that the Eleventh Amendment does not bar Lynn's claims for prospective relief against West and Faulkner in their official capacities. We agree with these rulings.

The Eleventh Amendment provides as follows: The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign States." U.S. Const. amend. XI. The Eleventh Amendment applies to suits in federal court brought by a state's own citizens even though the language of the amendment would seem to limit its application to suits brought by "Citizens of another State." *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 *(1993); Harter v. Vernon*, 101 F.3d 334, 337 (4th Cir. 1996).

Lynn has not suggested a valid reason, such as consent or congressional abrogation, why the Eleventh Amendment does not bar his suit against North Carolina. *See generally Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 238 (1985) ("[I]f a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action."); *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456 (1976) (holding that Congress has power to abrogate Eleventh Amendment immunity under § 5 of the Fourteenth Amendment). Accordingly, we affirm the district court's determination that the State of North Carolina is entitled to Eleventh Amendment immunity.

As noted, Lynn also sued West and Faulkner in their official capacities. Under *Ex parte Young,* 209 U.S. 123 (1908), there is "federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to 'end a continuing violation of federal law.' " *Seminole Tribe of Florida v. Florida,* 116 S. Ct. 1114, 1132 (1996) (quoting *Green v. Mansour,* 474 U.S. 64, 68 (1985)). Lynn seeks two forms of relief from West and Faulkner. First, he seeks monetary damages for loss of property he claims was seized in violation of the Fourteenth Amendment. Second, he seeks declaratory and injunctive relief. He asks for a judgment declaring the Drug Tax to be unconstitutional because it (1) imposes multiple punishment in violation of the Double Jeopardy Clause, (2) amounts to a criminal penalty imposed without the required due process safeguards, and (3) is a bill of attainder. If the tax's present enforcement scheme is declared

unconstitutional, Lynn seeks an injunction against West and Faulkner to stop their continuing efforts to collect the assessment.

The Eleventh Amendment bars Lynn's § 1983 claim for monetary damages against West and Faulkner in their official capacities. "[W]hen determining if an officer or entity enjoys Eleventh Amendment immunity a court must first establish whether the state treasury will be affected by the law suit." *Harter*, 101 F.3d at 340. In the action for monetary damages against West and Faulkner in their official capacities, North Carolina would pay any "final judgment awarded in a court of competent jurisdiction against a State employee . . . ." N.C. Gen. Stat. § 143-300.6(a)(1996). Therefore, the lawsuit could affect the state treasury. *See Barfield v. Blackwood*, 7 F.3d 1140, 1146 (4th Cir. 1993) (noting effect on state treasury and concluding that N.C. Gen. Stat. § 143-300.6(a) does not waive Eleventh Amendment immunity). "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). Accordingly, we affirm the district court's conclusion that the Eleventh Amendment bars Lynn's § 1983 claim for monetary damages against West and Faulkner in their official capacities.

To the extent Lynn seeks a declaratory judgment and an injunction to block further enforcement of the Drug Tax, *Ex*

parte Young does permit his action against West and Faulkner in their official capacities. In *Ex parte Young* the Supreme Court held that the Eleventh Amendment did not bar an action in federal court to enjoin the Attorney General of Minnesota from enforcing a statute claimed to violate the Fourteenth Amendment. *See Ex parte Young,* 209 U.S. 123, 159-60 (1908).

> This holding has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect. But the relief awarded in *Ex parte Young* was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment.

Edelman v. Jordan, 415 U.S. 651, 664 (1974).

The Eleventh Amendment therefore does not bar Lynn's official capacity claims for declaratory and injunctive relief. "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour,* 474 U.S. 64, 68 (1985). Of course, a judgment declaring that the Drug Tax is a criminal penalty could impact the state treasury of North Carolina, at least until the state implements enforcement procedures that conform to the requirements of the

United States Constitution.[3] But some fiscal impact on the state treasury is the necessary result of prospective decrees forcing compliance with the Constitution. *Edelman*, 415 U.S. at 668. "Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*." *Id.* The district court in this case correctly held that the doctrine of *Exparte Young* allows Lynn's action to the extent he seeks prospective relief, specifically, a declaratory judgment and an injunction against "ongoing constitutional violations."

IV.

We now turn to Lynn's claim for prospective relief. Lynn argues that under *Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994), the Drug Tax must be called a criminal penalty, not a civil tax. We agree and hold that the Drug Tax may not be enforced absent the constitutional safeguards that attach to criminal proceedings.

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[3] North Carolina has been the most aggressive of the states in enforcing its tax on illegal drugs. In 1993, for example, North Carolina collected over six million dollars, more than ten times as much money as the next highest state, Kansas. *See* Payoff From Taxing Drugs, *News & Observer* (Raleigh, NC), June 7, 1994, at A1. At oral argument counsel for North Carolina reported that the state had collected $26 million since 1990, all through forced collections.

In *Kurth Ranch* the Supreme Court examined Montana's Dangerous Drug Tax Act. The Kurth family had a ranch in central Montana. They raised grain and livestock, but they also cultivated and sold marijuana. In 1987 Montana law enforcement officials raided the ranch, arrested the Kurths, and confiscated the marijuana. Six members of the Kurth family were charged with drug crimes under Montana law. All eventually pled guilty; two Kurths went to prison, and the others got suspended or deferred sentences. *Kurth Ranch,* 511 U.S. at 772. The county attorney also brought a civil forfeiture action, which the Kurth family settled by agreeing to forfeit certain cash and farm equipment. *Id.* Next, the Montana Department of Revenue attempted to collect $900,000 in taxes assessed against the Kurths under the Montana Dangerous Drug Tax Act. Collection efforts were stayed when the Kurths filed for Chapter 11 bankruptcy. Later, the bankruptcy court decided that the tax assessment was a form of double jeopardy. After the district court and the court of appeals for the Ninth Circuit affirmed, Montana brought the case to the Supreme Court. *id.* at 773-76.

The Supreme Court also affirmed, holding that assessment of the Montana tax following state criminal proceedings violated the Double Jeopardy Clause:

> This drug tax is not the kind of remedial sanction that may follow the first punishment of a criminal offense. Instead, it is a second punishment within the contemplation of a constitutional protection that has deep roots in

> our history and jurisprudence, and therefore must be imposed during the first prosecution or not at all.

Id. at 784 (internal quotation marks and citation omitted). The Court reached its holding by discussing four features that rendered the tax a second punishment: (1) the high tax rate, *id.* at 780-81, (2) the deterrent purpose of the tax, *id.*, (3) the fact that the tax was conditioned on the commission of a crime, *id.* at 781-82, and (4) the fact that the tax was levied on " 'possession' of goods that no longer exist and that the taxpayer never lawfully possessed," *id.* at 783. "Taken as a whole," the Court concluded, "this drug tax is a concoction of anomalies, too far removed in crucial respects from a standard tax assessment to escape characterization as punishment . . . ." *Id.*

The central question in this case, like that in *Kurth Ranch,* is whether the tax in question is, despite its label, a criminal penalty.[4] A "tax" can encompass any "pecuniary burden laid upon individuals or property for the purpose of supporting the government." *New Jersey v. Anderson,* 203 U.S. 483, 492 (1906). The North Carolina Drug Tax, as a pecuniary

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[4] Whether the statute imposes what amounts to a criminal sanction remains the proper inquiry. *See Hudson v. United States,* 1997 WL 756641 at *6 & n.6 (U.S. Dec. 10, 1997) (acknowledging that *Kurth Ranch* engaged in a proper analysis); *see also id.* at *10 (Stevens, J., concurring) (noting majority's reaffirmation of central holding of *Kurth Ranch), id.* at *13 (Breyer, J., concurring) (same).

burden laid upon drug dealers, is in that sense a tax. But the question here is whether the tax is so punitive that the constitutional protections afforded to criminal defendants should attach to its enforcement. " '[T]here comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment." ' *Kurth Ranch,* 511 U.S. at 779 (quoting *A. Magnano Co. v. Hamilton,* 292 U.S. 40, 46 (1934)). A penalty "may be termed a duty or tax and yet be a penalty. Its name does not determine its nature."[5] *Fontenot v. Accardo,* 278 F. 871, 874 (5th Cir. 1922). As we explain below, North Carolina's Drug Tax, like Montana's Dangerous Drug Tax, has enough punitive features that its nature is that of a criminal penalty, not a civil tax.

The North Carolina Drug Tax shares the first two features of the Montana tax examined in *Kurth Ranch:* a high rate of taxation and a deterrent purpose. These features tend to show that the Drug Tax is punitive, although standing alone

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[5] *Kurth Ranch* dictates that we analyze the tax according to its substantive effect, not its formal label. *Id.* at 779 (noting that "a tax is not immune from double jeopardy scrutiny simply because it is a tax"). *Accord Lipke v. Lederer,* 259 U.S. 557, 561 (1922) ("The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid."). Accordingly, the fact that North Carolina labels its tax an "excise tax," while Montana characterized its tax as a "property tax," does not affect our analysis.

they might not be enough. Many taxes that are presumed valid, such as those on cigarettes and alcohol, are also high and motivated in part by deterrence. *See Kurth Ranch*, 511 U.S. at 780-81; *United States v. Sanchez*, 340 U.S. 42, 46 (1950) (upholding federal tax on marijuana). In *Kurth Ranch* the Court noted that Montana had taxed the drugs at about 400 percent of their market value. *Id.* at 780 n.17. Neither Montana nor the United States could offer an example of a tax on cigarettes, alcohol, or anything else that approached this rate. *Id.* The remarkably high tax rate, the Court concluded, was "at least consistent with a punitive character." *Id.* at 780. The deterrence factor, the Court said, was "beyond question." *Id.*

The rate of taxation imposed by the North Carolina Drug Tax yields an even higher penalty than the tax in *Kurth Ranch*. Here, Lynn was assessed a $194,000 tax for his possession of 970 grams of cocaine, a rate of about $200,000 per kilogram. The parties in this case have not estimated the market value of the cocaine seized from Lynn. A review of several federal cases, however, indicates that the market value for a kilogram of cocaine is about $25,000. *See, e.g., United States v. Anderson*, 76 F.3d 685, 692 (6th Cir. 1996) (affirming trial court finding that market price was $22,500 per kilogram); *United States v. Sureff*, 15 F.3d 225, 228 (2d Cir. 1994) (concluding that defendant's statement "24 or 25" referred to sales price of kilogram of cocaine, in thousands); *United States v. Hicks*, 948 F.2d 877, 880 n.1 (4th Cir. 1991) (affirming sentence based on $32,000 per kilogram). Based on this estimate the Drug Tax imposes a liability of eight times the

market value of the substance. North Carolina also assessed a $194,000 penalty for Lynn's failure to pay the tax within 48 hours of when he came into possession of the cocaine. The addition of the penalty makes the effective rate of taxation 1,600 percent, or sixteen times, the market value.[6] This shows that, like in *Kurth Ranch,* the tax rate has no rational relationship to the market value of the drugs. In addition, the extremely high tax is "beyond question" intended "to deter people from possessing [illegal drugs]." *Kurth Ranch,* 511 U.S. at 780. Although the high tax rate and deterrent purpose lend support to the argument that the Drug Tax is a criminal penalty, "these features, in and of themselves, do not necessarily render the tax punitive." *Id.* at 781. We will therefore look at other features of the tax.

The Drug Tax also has the third feature discussed in *Kurth Ranch*: it is conditioned on the commission of a crime. In *Kurth Ranch* the Court explained that "[p]ersons who have been arrested for possessing marijuana constitute the entire class of taxpayers subject to the Montana tax." *Kurth Ranch,* 511 U.S. at 781-82. The situation is the same with North Carolina's Drug Tax. Counsel for North Carolina explained at

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[6] Purity levels are irrelevant in determining the amount of the tax. For assessment purposes a "quantity of marijuana or other controlled substance is measured by the weight of the substance whether pure or impure or dilute[.]" N.C. Gen. Stat. § 105-113.107 (1996). The record in this case does not reveal the purity level of the cocaine found at Lynn's house.

oral argument that when a drug arrest or seizure is made, law enforcement officers send an arrest or seizure report to the Department of Revenue. The Department then assesses the tax liability and seizes any assets not already seized under federal and state criminal or civil drug forfeiture laws. Because an assessment of tax liability operates more broadly than an order of forfeiture, the Department can levy upon the remaining property of the taxpayer without proving the property's connection to a drug crime.[7]

The Drug Tax is imposed on "dealers," *i.e.*, persons who possess sufficient quantities of a "controlled substance" as that tem is defined in the criminal code of North Carolina.

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[7] The Drug Tax goes much further than state and federal drug forfeiture laws. The Supreme Court has said that most in rem civil forfeiture proceedings are properly characterized as civil, not criminal, and that in rem forfeiture proceedings generally do not violate the Double Jeopardy Clause when brought after a criminal prosecution. *See, e.g., United States v. Ursery,* 116 S. Ct. 2135, 2149 (1996). North Carolina's tax on illegal drugs takes asset confiscation to a different level. An assessment of Drug Tax liability, unlike an order of forfeiture, can be satisfied out of *any* property owned by the defendant, not just property linked to a drug crime. *See* N.C. Gen. Stat. § 105-113.111 (1996) ("The Secretary shall use all means available to collect the tax, penalty, and interest from any property in which the dealer has a legal, equitable, or beneficial interest."). Thus, unlike the in rem civil forfeiture situation, the Drug Tax sweeps too broadly to take advantage of the legal fiction that the property itself is guilty.

North Carolina argues that dealers not yet arrested for drug crimes could, theoretically, pay the Drug Tax. *See State v. Ballenger*, 472 S.E.2d 572, 574-75 (N.C. Ct. App. 1996) (emphasizing that Drug Tax is not predicated upon whether taxpayer has been arrested or charged); *cf. State v. Ballenger*, 481 S.E.2d 84, 84 (N.C. 1997) (affirming Court of Appeals without explanation) (per curiam). The statute requires drug dealers to report the tax on a form prescribed by the Secretary of Revenue. *See* N.C. Gen. Stat. § 105-113.108 (1996). After payment, the Secretary is supposed to send the dealers stamps to affix to the drugs. *See id.* Presumably in an attempt to avoid conflict with the Fifth Amendment Self-Incrimination Clause, the Drug Tax statute provides that information obtained from the form cannot be used in a criminal prosecution. *See id.* § 105-113.112. Counsel for North Carolina admitted at oral argument, however, that he does not know of any dealer who has in fact self-reported and paid his Drug Tax bill. Counsel also admitted that the Secretary has not prepared a form for reporting and paying the tax, even though the statute says she is to "prescribe" one. Nor does North Carolina collect the tax from those who legitimately possess drugs, such as doctors who use morphine (a "controlled substance") in medical treatment. *See id.* § 90-89(b) (listing morphine as Schedule I controlled substance); *See also id.* § 105-113.107A (exempting from Drug Tax any "dealer who is authorized by law to possess the substance"). Once again, as in *Kurth Ranch*, persons arrested for drug crimes constitute the entire class of taxpayers generating revenue under the North Carolina Drug Tax. *See also Kurth Ranch*, 511 U.S. at 788 n.2 (Rehnquist J.,

dissenting) (commenting, after counsel for Montana described a Minnesota tax similar to the North Carolina Drug Tax, "Not surprisingly, when asked at oral argument 'Does Minnesota collect any money off that scheme . . . . Not too many stamps being sold?', counsel for respondents admitted, amidst laughter, that he did not know the answer."). The theoretical possibility that a drug dealer could voluntarily pay the Drug Tax does not take the tax out of the criminal penalty category. The unused statutory reporting and payment scheme, while clever, is not enough to distinguish *Kurth Ranch*. The Drug Tax is still based on a criminal act.

The Drug Tax also has the fourth feature present in *Kurth Ranch*: the tax has no relationship to lawful possession. As the Court explained, "[a] tax on 'possession' of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character." *id.* at 783. In this case. as with the Montana tax, the taxpayer (Lynn) had no property right in the drugs, which had been confiscated by the time the Department of Revenue made its assessment. *See* 21 U.S.C. § 881(a)(1) (providing that "no property right shall exist in" controlled substances); J.A. 59 (Notice of Assessment dated March 2, 1993).

Kurth Ranch's consideration of lawful possession alludes to the distinction between license taxes and criminal penalties. A license fee exacts a cost for the "privilege of carrying on" a "lawful business or occupation." Black's Law Dictionary 921 (6th ed. 1990); *Fontenot v. Accardo,* 278

F. 871, 875 (5th Cir. 1922) (explaining that tax on liquor imposed during Prohibition was a criminal penalty, not license fee on "lawful business or occupation"). Payment of a license fee confers lawful possession. For example, tobacco and alcohol manufacturers, wholesalers, and retailers must pay steep taxes as a condition to legal operation of their businesses. *See, e.g.*, N.C. Gen. Stat. § 105-113.74 (1996) (describing alcohol license taxes). In addition, lawful possession of cigarettes is conditioned on having tax stamps affixed to the product. *See, e.g., id.* § 105-113.31 (possession of non-tax-paid cigarettes). In the case of marijuana or cocaine, however, payment of the Drug Tax does not confer a legal privilege to engage in drug dealing. Nor is payment of the tax simply a condition precedent to lawful possession. *See id.* § 105-113.105 ("Nothing in this Article may in any manner provide immunity from criminal prosecution for a person who possesses an illegal substance.").

In this context the Supreme Court has often cited the feature of lawful possession to distinguish between a license tax and a criminal penalty. In *United State v. Sanchez*, 340 U.S. 42, 46 (1950), for example, the Supreme Court upheld the federal Marihuana [sic] Tax Act, which imposed a $100 per ounce tax on transferees of marijuana who were not registered with the Treasury Department.[8] The rate of taxation on legally

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[8] The Marihuana [sic] Tax Act was repealed by the Comprehensive Drug Abuse Prevention and Control Act of

(continued...)

registered transferees, however, was only $1 per ounce. At the time, many states allowed state-licensed manufacturers and wholesalers to process and sell marijuana. Many state laws also allowed possession by apothecaries, researchers, physicians, dentists, persons for whom marijuana had been prescribed, and others. *See Leary v. United States*, 395 U.S. 6, 16-17 (1969). The *Sanchez* Court noted that by requiring transferees to register with the Treasury Department, the tax "implements the congressional purpose of restricting traffic in marihuana [sic] to accepted industrial and medicinal channels." *Sanchez*, 340 U.S. at 44. *Cf. Minor v. United States*, 396 U.S. 87, 97, 97-98 n.12 (1969) (noting that of the 400,000 registered narcotics dealers in 1967, only four were reported during that year for a violation of the narcotics laws). In this case, unlike *Sanchez*, there is no legislative intent to allow cocaine trafficking within any "accepted [ ] channels."

If payment of the Drug Tax conferred legal ownership, then the tax would amount to nothing more than an expensive licensing or excise fee. The fact that it does not is another strong indication that the tax is a criminal penalty. *Compare Regal Drug Corp. v. Wardell*, 260 U.S. 386, 392 (1922) (holding that tax on liquor during Prohibition is penalty); *Lipke v. Lederer*, 259 U.S. 557, 561 (1922) (same); *and Fontenot v. Accardo*, 278 F. 871, 875 (5th Cir. 1922) (same), *with Sonzinsky v. United States* ,300 U.S. 506, 513-14 (1937)

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[8](...continued)
1970, Pub. L. No. 91-513, 84 Stat. 1236, 1292.

(upholding license tax on firearms and distinguishing cases where subject of the tax is criminal); *and United States v. Doremus*, 249 U.S. 86, 94 (1919) (upholding constitutionality of Harrison Narcotic Drug Act, which imposed tax on "lawful business" in coca and opium; noting that license tax provisions "tend to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue"). We therefore conclude that the Drug Tax also shares the fourth feature examined in *Kurth Ranch*, the absence of a relationship to lawful possession.

The *Kurth Ranch* Court did not indicate that the features it cited were meant to be exclusive. However, the Drug Tax contains no features that allow us to distinguish *Kurth Ranch*. The rate of taxation is even steeper than the tax in *Kurth Ranch*. Unlike the application of a normal income tax on illegal activity, the Drug Tax is enforced only against criminals.[9] And

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[9] *Kurth Ranch* does not affect the proper characterization of a tax on illegal income as civil in nature. The income tax subjects criminals, such as drug dealers, bookmakers, and moonshiners, to the same tax obligations faced by law-abiding taxpayers. *See Thomas v. Commissioner*, 62 F.3d 97, 101 (4th Cir. 1995) (noting that taxpayer who failed to pay income tax on illegal drug income "is being treated no differently than any other person who has failed to pay income tax. . . . Unlike the defendants in *Kurth Ranch*, who were taxed *because* of their illegal activity, Thomas would face this tax liability regardless of the source of his income."). (continued...)

unlike the marijuana tax upheld in *Sanchez*, the Drug Tax does not contemplate lawful dealings in the product that is the subject of the tax. The Drug Tax singles out a class of persons who have engaged in criminal activity and subjects the class to a rate of taxation far beyond that faced by any legitimate taxpayer. As the Supreme Court said when it held that a Prohibition era tax was a criminal penalty,

> [C]ertainly we cannot conclude . . . that penalties for crime should be enforced through the secret findings and summary action of executive officers. The guarantees of due process of law and trial by jury are not to be forgotten or disregarded.

Lipke v. Lederer, 259 U.S. 557, 562 (1922). Accordingly, we hold that the Drug Tax is a criminal penalty[10]

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[9](...continued)
Taxing illegal income is simply an application of the broad scope of Internal Revenue Code § 61, which defines income as all income "from whatever source derived."

[10] In *Hudson v. United States*, 1997 WL 756641 (U.S. Dec. 10, 1997), the Supreme Court applied "traditional double jeopardy principles" and concluded that certain administrative sanctions (monetary penalties and disbarment) under the banking laws were not criminal punishment. *Id.* at *7. The Court in *Hudson* noted that the "clearest proof" of a sanction's punitive form and effect is required to overcome an indication of legislative intent to impose a civil sanction. *Id.* at

(continued...)

V.

This case does not raise the same double jeopardy concerns as *Kurth Ranch*. In *Kurth Ranch* characterization of the tax as a criminal penalty triggered the protections of the Double Jeopardy Clause. In this case the Double Jeopardy Clause does not apply because it does not bar successive prosecutions by different sovereigns. *See Abbate v. United States*, 359 U.S. 187, 195 (1959). Only the United States prosecuted Lynn for cocaine possession, so the Double Jeopardy Clause does not bar North Carolina's enforcement of the Drug Tax even though it is a criminal penalty. Because the United States brought the prior criminal prosecution, North Carolina remained free to impose its own criminal sanctions.

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[10](...continued)
*5, *7, *8, citing *United States v. Ward*, 448 U.S. 242, 249 (1980). This does not appear to make the challenger's burden any tougher than it already was. In any event, the crucial aspects of the North Carolina Drug Tax do provide clearest proof of punitive intent: although nominally labeled an "excise tax," the Drug Tax is enforced only against those arrested for drug crimes, and - unlike routine license and excise taxes - payment of the tax confers no legal privilege to possess or sell. *See* supra at 14-17.

VI.

Because the Drug Tax is in reality a criminal penalty, its enforcement must conform to the constitutional safeguards that accompany criminal proceedings. *See Carbon Fuel Co. v. United Mine Workers,* 517 F.2d 1348, 1349 (4th Cir. 1975) (holding that because contempt proceedings were properly characterized as criminal, not civil, judgment must be reversed because of denial of due process); *see also Bush Ranch, Inc. v. E. I. DuPont de Nemours & Co.,* 99 F.3d 363, 369 (11 th Cir. 1996) ("[W]e must reverse the contempt order because the district court did not afford DuPont the procedural protections the Constitution requires for the imposition of criminal contempt sanctions."). "Some governmental exactions are so punitive that they may only be imposed in a criminal proceeding." *Kurth Ranch,* 511 U.S. at 793 (O'Connor, J., dissenting) (citing *United States v. Ward,* 448 U.S. 242, 248-49 (1980)). This conclusion is consistent with the holding in *Kurth Ranch.* As Justice Scalia noted in his dissent there, the majority's holding relied on the basic notion that the tax was equivalent to a criminal prosecution. "Assessment of a criminal punishment in a civil tax proceeding would violate not only the Double Jeopardy Clause, but all of the criminal-procedure guarantees of the Fifth and Sixth Amendments." *Kurth Ranch,* 511 U.S. at 807 (Scalia, J., dissenting). *Accord id.,* 511 U.S. at 797 (O'Connor, J., dissenting) ("[P]resumably the State cannot tax *anyone* for possession of illegal drugs without providing the full panoply of criminal procedure protections found in the Fifth and Sixth Amendments, given the

Court's holding that '[t]he proceeding Montana initiated to collect a tax on the possession of drugs was the functional equivalent of a successive criminal prosecution."'). Enforcing a criminal punishment in a civil proceeding is incompatible with the important constitutional distinctions between civil and criminal procedure:

> Civil Procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties do not apply. Thus the determination of the facts upon which liability is based may be by an administrative agency instead of a jury, or if the prescribed proceeding is in the form of a civil suit, a verdict may be directed against the defendant; there is no burden upon the Government to prove its case beyond a reasonable doubt, and it may appeal from an adverse decision; furthermore, the defendant has no constitutional right to be confronted with the witnesses against him, or to refuse to testify; and finally, in the civil enforcement of a remedial sanction there can be no double jeopardy.

Helvering v. Mitchell, 303 U.S. 391, 402-04 (1938) (Brandeis, J.) (footnotes omitted). North Carolina cannot treat the imposition of its Drug Tax as if it is a civil sanction. It is a criminal penalty, and a taxpayer pursued for Drug Tax liability

must be afforded all of the constitutional safeguards due a criminal defendant.[11]

VII.

The district court never reached the issue of whether the Drug Tax is a criminal penalty under *Kurth Ranch*. The court reasoned that because the Drug Tax is a "tax under State law," *see* 28 U.S.C. § 1341, the Tax Injunction Act prevents a district court from exercising subject matter jurisdiction over Lynn's claims for declaratory and injunctive relief. We disagree because a tax on illegal drugs that reaches the level of a criminal penalty under *Kurth Ranch* is not properly characterized as a "tax under State law."

The Tax Injunction Act provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of

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[11] Lynn also challenges the constitutionality of the Drug Tax by arguing that it is a bill of attainder passed by a state in violation of Article 1, section 10 of the United States Constitution. A legislative act is an unconstitutional bill of attainder if it singles out an individual or narrow class of persons for punishment without a judicial proceeding. *See, e.g., United States v. Brown*, 381 U.S. 437, 449-456 (1965). Because we hold that the Drug Tax is in reality a criminal penalty, future enforcement of the tax must be accompanied by appropriate judicial proceedings. Accordingly, we have no occasion to consider whether the Drug Tax is a bill of attainder.

> any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341. The Tax Injunction Act prohibits district court jurisdiction over an action if (1) the action is to "enjoin, suspend or restrain the assessment, levy or collection" of a state tax, (2) the tax is a "tax under State law," and (3) the state provides a "plain, speedy and efficient remedy" in its own courts. *See International Lotto Fund v. Virginia State Lottery Dep't,* 20 F.3d 589, 593 (4th Cir. 1994); *San Juan Cellular Tel. Co. v. Public* Serv. *Comm'n,* 967 F.2d 683, 685 (1st Cir. 1992).

The first element of the Tax Injunction Act is present. An injunction against the continued enforcement of the Drug Tax against Lynn would "enjoin" the "collection" of what has been labeled a state tax. Declaratory relief concerning state taxes is also barred by the Tax Injunction Act. *See California v. Grace Brethren Church,* 457 U.S. 393, 408 (1982). *See also Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293, 299 (1943) ("[T]hose considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure.").

The Drug Tax lacks the second element, however. A criminal penalty, however labeled, is not a "tax under State law" for Tax Injunction Act purposes. The Act "was initially 'predicated upon the desirability of freeing, from interference by the federal courts, state procedures which authorize

litigation challenging a tax only after the tax has been paid."' *International Lotto Fund*, 20 F.3d at 593 (quoting *Great Lakes*, 319 U.S. at 301). The policy considerations that support the Tax Injunction Act do not extend to state criminal prosecutions, which raise different constitutional concerns than those present in assessing and collecting an ordinary state tax. *See Steffel* v. *Thompson*, 415 U.S. 452, 472 n.20 (1974) (noting that there is no statutory counterpart of Tax Injunction Act applicable to state criminal prosecutions).[12]

The few cases that address the issue confirm that federal courts have jurisdiction to examine a tax that is in reality a criminal penalty. "[I]n such a setting, where the so-called tax has clearly punitive qualities, it may, if invalid, be enjoined." *Denton v. City of Carrollton*, 235 F.2d 481, 485 (5th Cir. 1956) (citations omitted) (holding that despite Tax Injunction Act

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[12] We reiterate that the Eleventh Amendment, discussed *supra*, operates to protect the state treasury from direct interference by the federal courts. At issue in this case is the future enforcement of a criminal penalty, not the ancillary effect on the financing of state government. *Cf. Edelman v. Jordan*, 415 U.S. 651, 668 (1974) ("Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex Parte Young* [.]"). Green v. Mansour, 474 U.S. 64, 68 (1985) ("[T]he availability of prospective relief . . . gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.").

district court should have considered constitutional questions arising from steep license tax on labor organizers). *Cf. Lipke v. Lederer*, 259 U.S. 557, 561-62 (1922) (holding that because Prohibition era tax on liquor was a penalty, statutory mandate that "[n]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court" did not apply); *Regal Drug Corp. v. Wardell*, 260 U.S. 386, 392 (1922) (same).[13] Accordingly, we reverse the district court's holding that jurisdiction is barred by the Tax Injunction Act. The Tax

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[13] The district court relied on a series of cases distinguishing taxes from regulatory fees, which are not subject to the Tax Injunction Act. *See, e.g., Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 931 (9th Cir. 1996) (considering as factors "(1) the entity that imposes the assessment; (2) the parties upon whom the assessment is imposed; and (3) whether the assessment is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed"). The district court concluded that the Drug Tax was not a regulatory fee. The cases discussing regulatory fees do not help in the analysis in this case, however. Regulatory fees are civil and remedial in nature. A criminal penalty raises different constitutional concerns that outweigh the state's interest in the orderly administration of taxes. We simply note that no court has held that a criminal penalty, although labeled as a tax, falls within the ambit of the Tax Injunction Act.

Injunction Act does not apply to state taxes that are in reality criminal penalties.[14]

VIII.

For the foregoing reasons we hold that the Controlled Substance Tax is a criminal penalty, and we reverse the district court on that point. North Carolina's enforcement scheme must provide the constitutional safeguards that attach to criminal prosecutions. We do not believe, however, that a remand is necessary in this case. In their complaint the plaintiffs ask for monetary damages, declaratory relief, and injunctive relief. Their request for monetary damages is barred by the Eleventh Amendment and for failure to state a claim, and we affirm the district court on those determinations. Although we have declared that the Drug Tax is a criminal penalty, we do not believe that injunctive relief is necessary at the present time. Even though North Carolina has only partially satisfied its Drug Tax assessment against Lynn, there is no pending state proceeding to be enjoined. Nor is there any indication that North Carolina will not comply with this opinion in the future. The judgment of the district court is therefore

AFFIRMED IN PART AND REVERSED IN PART.

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[14] Because the Drug Tax is not a "tax under State law," we need not consider the third element, that is, whether Lynn has a "plain, speedy and efficient remedy" in state court.

MEMORANDUM OPINION OF UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, GREENSBORO DIVISION, ENTERED FEBRUARY 15, 1996

In the United States District Court
for the Middle District of North Carolina
Greensboro Division

Entered February 15, 1996

David L. Lynn, Jr.,)
Robin Dixon Lynn,)
Rodney Lynn, Roxanne Lynn,)
and David L. Lynn, Sr.,)
Plaintiffs,)
v.)
) 2:94CV00577
Deborah West, individually and)
in her official capacity as agent)
of the State of North Carolina,)
Janice Faulkner, Secretary of)
Revenue for the State of North)
Carolina, in her official)
capacity, and the State of North)
Carolina,)
Defendants.)

MEMORANDUM OPINION

TILLEY, District Judge

Defendants have filed a Motion to Dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted under Fed. R.

Civ. P. 12(b)(1) and (6). For the reasons set forth below, Defendants' Motion is GRANTED.

I.

On October 6, 1994, David L. Lynn, Jr., Robin Dixon Lynn, Rodney Lynn, Roxanne Lynn, and David L. Lynn, Sr. ("Plaintiffs") filed a Complaint challenging the constitutionality of North Carolina's Controlled Substance Tax, N.C. Gen. Stat. §§ 105-113.105 through 105-113.113 ("Controlled Substance Tax"). The Complaint also contests the propriety of several seizures of personal property made by the State of North Carolina in connection with a tax assessed under the Controlled Substance Tax. Plaintiffs named as defendants Deborah West, individually and in her official capacity as an agent for the North Carolina Department of Revenue, Janice Faulkner, in her official capacity as North Carolina's Secretary of Revenue, and the State of North Carolina ("Defendants").

Plaintiffs' Complaint includes eleven causes of action arising from a $389,125.20 assessment charged against David L. Lynn, Jr. ("Lynn") under the Controlled Substance Tax. The assessment was imposed after agents of the Rockingham County Sheriff's Department, United States Government, and North Carolina Department of Motor Vehicles seized 970 grams of cocaine during a search of Lynn's residence in Reidsville, North Carolina on March 1, 1993. Lynn was later indicted and convicted on federal drug charges in the United States District Court for the Middle District of North Carolina.

After receiving a Notice of Controlled Substance Tax Assessment on March 2, 1993, Lynn filed an Objection to Assessment and Application for Hearing with the Department of Revenue. On April 12, 1993, before a hearing was held on Lynn's objection, agents of the Rockingham County Sheriff's Department seized several items of Lynn's personal property. In addition to these items, Deborah West seized a Mitsubishi 3000GT automobile, VIN # JA3XE74C2NY063332 ("Mitsubishi") and a Mercedes Benz 450SL automobile, VIN # 0704412032106 ("Mercedes"). The State of North Carolina has also seized a commercial building located at State Highway 87 and 65 West in Reidsville, North Carolina (the "Radio Station"). All of these items were seized by the State in an effort to collect the Controlled Substance Tax assessed against Lynn.

Plaintiffs' Complaint seeks monetary, declaratory, and injunctive relief. Plaintiffs contend that the Controlled Substance Tax violates the Double Jeopardy Clause of the Fifth Amendment, the Excessive Fines Clause of the Eighth Amendment, and the Due Process Clause of the Fourteenth Amendment, as well as constituting an unconstitutional bill of attainder under Article 1, section 10, clause 1 of the United States Constitution. In addition, Plaintiffs contend the seizures of the automobiles and the Radio Station were unlawful because: (1) Lynn conveyed the Mitsubishi to Robin Dixon (now Robin Dixon Lynn) on February 14, 1993; (2) the Mercedes was titled in Rodney Lynn's name; and (3) the Radio

Station was subject to a judgment lien obtained by Roxanne Lynn on September 21, 1990 in the Superior Court of Rockingham County.

In their Motion to Dismiss, Defendants maintain that Plaintiffs' Complaint is deficient in two respects. First, Defendants argue that there is no federal subject matter jurisdiction over Plaintiffs' claims. Second, Defendants argue that even if there is subject matter jurisdiction, Plaintiffs have failed to state a claim upon which relief can be granted.

II.

Defendants first contend that Plaintiffs' Complaint should be dismissed for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). In their Brief in Support of Motion to Dismiss, Defendants argue that the Eleventh Amendment, the doctrine of qualified immunity, the Tax Injunction Act, 28 U.S.C. § 1341, and principles of comity bar Plaintiffs' claims against Defendants.

Before discussing these jurisdictional arguments, it is important to note the different types of liabilities asserted against Defendants. Plaintiffs have brought their claims against the State of North Carolina, Janice Faulkner, in her official capacity, and Deborah West, individually and in her official capacity. Official-capacity suits generally represent only another way of pleading an action against the entity of which the officer is an agent. *Monell v. New York City Dep't of Social*

Services, 436 U.S. 658, 690 n. 55 (1978). Personal capacity suits, on the other hand, seek to impose personal liability on a government official for actions he takes under color of state law. *See Ex parte Young*, 209 U.S. 123, 159-60 (1908) (holding that a state officer is stripped of his official character when he acts under a state law in an unconstitutional manner). To establish the personal liability of a state official in a section 1983 action, a plaintiff need only show that the official caused a deprivation of a federal right while acting under color of state law. *Monroe v. Pape*, 365 U.S. 167, 171 (1961).

The type of liability asserted by a plaintiff limits the field of defenses available to the defendant state official. In a personal capacity suit, an official may be able to assert personal immunity defenses such as qualified immunity -- objectively reasonable reliance on existing law. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (providing that "government officials performing discretionary functions, generally are shielded from liability for damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). These defenses are unavailable in official-capacity actions. *Kentucky v. Graham*, 473 U.S. 159, 167 (1985). Only forms of sovereign immunity, such as the Eleventh Amendment, may be claimed in an official-capacity action. *Graham*, 473 U.S. at 167.

In accordance with these principles, the eleven claims in Plaintiffs' Complaint are characterized as follows: Plaintiffs'

First, Second, Third, Fourth, Fifth, Sixth, and Tenth Claims for Relief, challenging the constitutionality of two North Carolina statutes, are official-capacity claims. These claims are brought against the State of North Carolina and Defendants West and Faulkner in their official capacities. Plaintiffs' Seventh, Eighth, Ninth, and Eleventh Claims for Relief allege deprivations of property without due process of law. Only Plaintiffs' Seventh and Eighth Claims for Relief name an individual defendant, Deborah West. These claims are individual-capacity claims. Plaintiffs' Ninth and Eleventh Claims for Relief are brought against "defendants" and do not allege involvement of either Defendants West or Faulkner. As such, these claims are treated as brought against the State of North Carolina and Defendants West and Faulkner in their official capacities, alleging past constitutional violations.

A.

Defendants first argue that the Eleventh Amendment bars each claim for relief contained in Plaintiffs' Complaint. The Eleventh Amendment to the United States Constitution provides that:

> [t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const., amend. XI. The rule that has emerged is that the

Eleventh Amendment bars suits in federal court against unconsenting states brought by citizens of the state or of another state, regardless of the type of relief sought. *Pennhurst State School & Hosp. v. Haiderman*, 465 U.S. 89, 100 (1984). The Eleventh Amendment also bars claims against state officials when "the state is the real, substantial party in interest," *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945), regardless of whether damages or injunctive relief is sought, *Cory v. White*, 457 U.S. 85, 91 (1982).

However, the Eleventh Amendment does not bar claims for declaratory or injunctive relief brought against state officials in their *official* capacities for alleged constitutional violations. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n. 10 (1989); *Ex parte Young*, 209 U.S. at 159-160. The application of this exception to the jurisdictional bar of the Eleventh Amendment is limited to those specific situations in which it is "necessary to permit the federal courts to vindicate federal rights and hold state officials to 'the supreme authority of the United States.'" *Pennhurst*, 465 U.S. at 105 (quoting *Young*, 209 U.S. at 160). Explaining this principle, the Supreme Court has noted: "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citation omitted).

Plaintiffs argue that the jurisdictional bar of the Eleventh Amendment does not apply to their claims because the Fourteenth Amendment, as applied through section 1983, allows claims otherwise barred by the Eleventh Amendment. This argument was rejected by the Supreme Court in *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). In that case, the Supreme Court held that by enacting section 1983 to allow causes of action for deprivations of constitutional rights under color of state law, Congress did not intend to abrogate a state's Eleventh Amendment immunity. *Id.* at 71. The *Will* Court concluded that the term "person" in section 1983 does not include States or state officials sued for damages in official-capacity suits. *Id.* However, state officials sued for declaratory or injunctive relief in official-capacity suits are "persons" for purposes of section 1983 because "official-capacity actions for prospective relief are not treated as actions against the states." *Id.* at 71 n. 10 (quoting *Graham*, 473 U.S. at 167 n. 14). State officials sued in their *individual* capacities are "persons" under section 1983, and therefore are not entitled to Eleventh Amendment immunity in section 1983 claims. *Hafer v. Melo*, 502 U.S. 21, 31 (1991); *Beardsley v. Webb*, 30 F.3d 524, 531 (4th Cir. 1994).

In this case, the Eleventh Amendment bars Plaintiffs' claims against the State of North Carolina. There is no indication that either the State of North Carolina or Congress has surrendered the State's Eleventh Amendment immunity from suit in federal court. Although states must comply with the requirements of the Due Process Clause of the Fourteenth

Amendment in providing a method for challenging allegedly unconstitutional taxes, the Eleventh Amendment prohibits litigants from bringing such claims against a state in federal court. Thus, all claims against the State of North Carolina are DISMISSED.

However, the Eleventh Amendment does not bar Plaintiffs' claims against Defendants Faulkner and West in their official capacities asserting ongoing constitutional violations. These claims include Plaintiffs' First, Second, Third, Fourth, Fifth, Sixth, and Tenth Claims for Relief, challenging the constitutionality of the Controlled Substance Tax and one provision of the Controlled Substances Act. Plaintiffs' relief is limited, however, to declaratory and injunctive relief. *See Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (stating that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment"). Because the tax was assessed solely against Lynn, only he has standing to challenge the constitutionality of the Controlled Substance Act. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (holding that to establish standing, a plaintiff must show that he has suffered an "injury in fact," which has a causal connection to the conduct complained of, and which is likely to be redressed by a decision in his favor).

Plaintiffs' Ninth and Eleventh Claims for Relief are brought against the State of North Carolina and Defendants West and Faulkner in their official capacities, alleging

deprivations of property without due process of law. The Eleventh Amendment bars Plaintiffs' claims against the State of North Carolina. The Eleventh Amendment also bars these official-capacity claims against Defendants West and Faulkner. Unlike Plaintiffs' First through Sixth and Tenth Claims for Relief, Plaintiffs' Ninth and Eleventh claims allege constitutional violations which are not ongoing, but rather occurred in the past. These claims do not fall within the *Young* exception and are therefore barred by the Eleventh Amendment. *See Papasan v. Allain*, 478 U.S. 265, 277-78 (1986) (explaining that the *Young* exception to the Eleventh Amendment jurisdictional bar "has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past . . .").

The Eleventh Amendment does not bar Plaintiffs' claims against Defendant West in her individual-capacity. These claims consist of Plaintiffs' Seventh and Eighth Causes of Action which allege that West's actions in seizing the Mitsubishi and Mercedes deprived Plaintiffs of their property without due process of law in violation of the Fourteenth Amendment. Because only Robin Dixon Lynn and Rodney Lynn have claimed an interest in the Mitsubishi and Mercedes, only they have standing to bring these individual-capacity claims against Defendant West. *See Lujan*, 504 U.S. at 560-61.

Application of the Eleventh Amendment to Plaintiffs Claims for Relief requires Plaintiffs' Ninth and Eleventh

Claims for Relief, as well as all claims against the State of North Carolina to be DISMISSED. However, Lynn's official-capacity claims against Defendants Faulkner and West (Plaintiffs' First, Second, Third, Fourth, Fifth, Sixth, and Tenth Claims for Relief) and the individual-capacity claims of Robin Dixon Lynn and Rodney Lynn against Defendant West (Plaintiffs' Seventh and Eighth Claims for Relief) are not barred by the Eleventh Amendment.

B.

In their Seventh and Eighth Claims for Relief, Plaintiffs assert that Defendant West seized two automobiles in reckless disregard of the ownership rights of Robin Dixon Lynn and Rodney Lynn. Plaintiffs contend that West did not have authority to seize these automobiles and that her actions violated the Due Process Clause of the Fourteenth Amendment. Defendants argue that these individual-capacity claims should be dismissed because West is entitled to qualified immunity.[1]

Under the doctrine of qualified immunity, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have

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[1]The defense of qualified immunity does not apply to claims against state officials in their official capacities. *Graham*, 473 U.S. at 167.

known." *Harlow v. Fitzgerald*, 457 U.S. at 818. The test for determining whether a defendant's actions are protected by qualified immunity requires: (1) identifying the specific right allegedly violated; (2) determining whether the right was clearly established when the alleged violation occurred; and (3) determining whether a reasonable officer would have known that the challenged action would violate that right. *Simmons v. Poe*, 47 F.3d 1370, 1385 (4th Cir. 1995) (citing *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992)). A trial court confronted with a qualified immunity defense should first determine whether the plaintiff has properly asserted a constitutional violation. *Siegart v. Gilley*, 500 U.S. 226, 232-33 (1991). If the plaintiff's allegations fall short of stating a constitutional claim, the defendant is entitled to dismissal based on qualified immunity or under Fed. R. Civ. P. 12(b)(6). *ACLU of Maryland v. Wicomico County, Md.*, 999 F.2d 780, 784 (4th Cir. 1993). A court should not dismiss a claim under Fed. R. Civ. P. 12(b)(6) unless it appears certain that, viewing the complaint in the light most favorable to the plaintiff, no set of facts could be proven which would entitle him to relief. *Mylan Lab., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1307 (1994).

An unauthorized deprivation of property by a state official does not constitute a due process violation if a meaningful post-deprivation state remedy for the loss is available. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (stating that in claims for intentional or negligent deprivations of property by state employees, "the state's action is not complete until and unless

it provides or refuses to provide a suitable postdeprivaton remedy"); *Parratt v. Taylor*, 451 U.S. 527, 543 (1981) (holding that a plaintiff claiming a deprivation of property under color of state law had failed to claim the denial of a federal right because the state provided a postdeprivation tort remedy). This rule applies regardless of whether the state official acted negligently or intentionally. *Hudson*, 468 U.S. at 533.

North Carolina law provides postdeprivation remedies for Plaintiffs' claims of deprivation of property that satisfy due process requirements. *See Wilkins v. Whitaker*, 714 F.2d 4, 6 (1983) (noting that "[u]nder North Carolina law, an action for conversion will lie against a public official who by an unauthorized act wrongfully deprives an owner of his property"), *cert. denied*, 468 U.S. 1217 (1984); N.C. Gen. Stat. §§ 143-291 (providing tort claims against state departments and agencies). Because an adequate remedy under North Carolina law is available, Plaintiffs are not entitled to federal relief on their claims of deprivation of property without due process of law. Plaintiffs' Seventh and Eighth Claims for Relief against Defendant West in her individual-capacity are therefore DISMISSED under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. *See ACLU of Maryland*, 999 F.2d at 784.

C.

In his Third, Fourth, Fifth, Sixth, and Tenth Claims for Relief, Lynn seeks declaratory and injunctive relief from the

collection of an assessment imposed against him under the Controlled Substance Tax. Defendants argue that the Tax Injunction Act, 28 U.S.C. § 1341 ("Tax Injunction Act" or "section 1341"), bars subject matter jurisdiction over these claims. The Tax Injunction Act provides that:

> [t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341. In order for the jurisdictional bar of the Tax Injunction Act to apply, a court must determine (1) that the assessment is a "tax under State law," and (2) that there is a "plain, speedy and efficient remedy" in state court.

Lynn argues that North Carolina's Controlled Substance Tax is a penalty rather than a tax, and consequently does not fall within the scope of the Tax Injunction Act. In support of his argument, Lynn relies solely on the Supreme Court's holding in *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1948 (1994), that a tax assessed under Montana's Dangerous Drug Tax Act, Mont. Code Ann. §§ 15-25-101 through 15-25-123 (1987), violated the Double Jeopardy Clause of the Fifth Amendment. The *Kurth Ranch* Court reasoned that because the Montana statute imposed a high rate of taxation, served a deterrent purpose, and was conditioned on the commission of a crime, it was sufficiently penal in nature to invoke Double Jeopardy protection. *Kurth*

Ranch, 114 S. Ct. at 1946. Lynn argues that because North Carolina's Controlled Substance Tax is similar to Montana's Dangerous Drug Tax Act, it too is a penalty and should therefore not be considered a "tax under State law" within the meaning of the Tax Injunction Act.

There are several reasons for not applying *Kurth Ranch* to Lynn's claims challenging the constitutionality of the Controlled Substance Tax. First, the *Kurth Ranch* Court never discussed whether the Tax Injunction Act would have barred the plaintiff's claim in that case. The Montana Department of Revenue apparently never raised this issue, presumably because the case originated in a bankruptcy proceeding. Although the Bankruptcy Code makes no reference to § 1341, bankruptcy courts are given the power to adjudicate state tax assessments under § 505(a)(1) of the Bankruptcy Code. *See City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122, 123 (10th Cir. 1990) (per curiam), *cert. denied*, 498 U.S. 823 (1990); *Southeastern Pennsylvania Transp. Authority v. Pennsylvania Public Utility Comm'n*, 802 F. Supp. 1273, 1283 (E.D. Pa. 1992); *In re Continental Credit Corp.*, 1 B.R. 680, 686 (Bankr. N.D. III. 1979); 11 U.S.C. § 505.

Second, the holding and reasoning of *Kurth Ranch* provide no guidance for determining whether an assessment under the Controlled Substance Tax is a "tax under State law" for Tax Injunction Act purposes. In *Kurth Ranch*, the Supreme Court held that the Montana statute was "fairly characterized as punishment" for purposes of the Double Jeopardy Clause.

Kurth Ranch, 114 S. Ct. at 1948. However, the *Kurth Ranch* Court never held that this characterization precluded the Montana statute from also being a tax.

Finally, the Double Jeopardy Clause and the Tax Injunction Act serve two distinct purposes. The Double Jeopardy Clause protects individuals against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The Tax Injunction Act, on the other hand, preserves state control over efforts to raise revenue by restricting the jurisdiction of federal district courts when a plaintiff seeks to enjoin a tax assessed under state law. While the *Kurth Ranch* Court decided whether the Montana Dangerous Drug Tax Act was a "penalty" for purposes of the Double Jeopardy Clause, the present issue in this case is whether the Controlled Substance Tax is a "tax under State law" within the meaning of the Tax Injunction Act. For these reasons, there is no justification for extrapolating the *Kurth Ranch* reasoning to Lynn's argument that an assessment under the Controlled Substance Tax is not a "tax under State law."

Courts which have decided the issue of what constitutes a "tax under State law" for Tax Injunction Act purposes, have considered three primary factors: "(1) the entity that imposes the assessment; (2) the parties upon whom the assessment is imposed; and (3) whether the assessment is expended for general public purposes, or used for the regulation or benefit of

the parties upon whom the assessment is imposed." *Bidart v. California Apple Comm'n*, 1996 WL 6969, at *5 (9th Cir. Jan. 10, 1996). *See also San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992) (distinguishing between "taxes" and "regulatory fees" for Tax Injunction Act purposes). Under the first and second factors, an assessment imposed directly by a state legislature on a broad class of parties is more likely to be a tax. *Bidart*, 1996 WL 6969, at *5-6. However, some courts have held that assessments imposed on a narrow class of persons may still be taxes under the Tax Injunction Act. *Bidart*, 1996 WL 6969, at *6 (collecting cases). Thus, the identity of the party upon whom the assessment is imposed should not weigh as heavily as the entity that imposes the assessment and the destination of the funds. Finally, under the third factor, assessments which are placed in a state's general funds and treated as general revenues are ordinarily considered taxes. *Id.* at *6. On the other hand, assessments placed in a specific fund and used only for specific purposes are generally not considered taxes unless they are used to provide "a general benefit to the public." *Id.* at *6-7.

In *Bidart*, an apple producer challenged a fee of one-fourth cent per pound of apples assessed by the California Apple Commission on all producers of more than 40,000 pounds of California apples per year. The Ninth Circuit held that because "the assessments are ultimately imposed by a non-legislative body on a small number of organizations, kept segregated from general California funds, and spent only for a purpose that does

not directly benefit the public at large," they were not taxes under state law. *Id.* at *8. In *San Juan Cellular*, the First Circuit held that a 3% (of gross revenue) "periodic fee" imposed by the Puerto Rico Public Service Commission on a private cellular service company was a regulatory fee rather than a tax under state law for federal tax injunction purposes. *San Juan Cellular*, 967 F.2d at 686.

Application of the factors set forth in *Bidart* and *San Juan Cellular* demonstrates that the Controlled Substance Tax is a "tax under State law" within the meaning of the Tax Injunction Act. First, an assessment under the Controlled Substance Tax is imposed by the North Carolina Legislature under N.C. Gen. Stat. § 105-113.107. Second, the Controlled Substance Tax applies only to dealers,[2] a narrow class of parties. Because this factor is less important than the other two, the fact that the Controlled Substance Tax may only be assessed against 'dealers' does not seriously weigh against its characterization as a tax. Finally, The Controlled Substance Tax is designed to raise revenue for "State and local law enforcement agencies and for the General Fund." N.C. Gen. Stat. § 105-113.105. This is accomplished by remitting 75% of the assessment proceeds to the state or local law enforcement agency conducting the

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[2]A "dealer" is defined as "[a] person who actually or constructively possesses more than 42.5 grams of marijuana, seven or more grams of any other controlled substance that is sold by weight, or 10 or more dosage units of any other controlled substance that is not sold by weight." N.C. Gen. Stat. § 105-113.106(3).

investigation which led to the assessment and placing the remaining proceeds in the general fund. N.C. Gen. Stat. § 105-113.113. A portion of the assessments are therefore treated as general revenues by being placed in the general fund. The remaining portion of the assessment, which is given back to the local law enforcement agency, although used for a specific purpose, provides a general benefit to the public by increasing the budgets of law enforcement agencies.

Because the Controlled Substance Tax is imposed directly by the North Carolina legislature and because the taxes assessed contribute to the state's general revenue or provide for the general benefit of the public, the statute is a "tax under State law" for Tax Injunction Act purposes. Lynn's claims challenging the constitutionality of the Controlled Substance Tax will therefore be dismissed under § 1341 if North Carolina courts provide a "plain, speedy and efficient remedy" for his claims.

A state court remedy is "plain, speedy and efficient" if it "provides the taxpayer with a full hearing and judicial determination at which she may raise any and all constitutional objections to the tax." *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982) (quoting *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 514 (1981)). In *Rosewell*, the Supreme Court held that a statute which required the taxpayer to pay the disputed tax before challenging it in state court satisfied the "plain, speedy and efficient remedy" requirement of the Tax Injunction Act. *Rosewell*, 450 U.S. at 528.

Similarly, in *International Lotto Fund v. Virginia State Lottery*, 20 F.3d 589 (4th Cir. 1994), the Fourth Circuit held that a Virginia statute requiring a taxpayer to pay the tax or post a bond before applying for relief in state court constituted a "plain, speedy and efficient remedy" within the meaning of the Tax Injunction Act. *Id.* at 593.

In North Carolina, taxpayers have available to them two primary methods with which they may challenge their state tax liability. North Carolina General Statute § 105-267 provides that any person with a valid defense to the collection of a tax assessed against him or his property may apply for relief in state superior court. To comply with the statute, the taxpayer must pay the disputed tax and make a written demand for a refund with the Secretary of Revenue. N.C. Gen. Stat. § 105-267. This method for challenging a disputed tax assessment is similar to those upheld by the Supreme Court in *Rosewell* and the Fourth Circuit in *International Lotto Fund.* The remedy provided in N.C. Gen. Stat. § 105-267 is therefore a "plain, speedy and efficient remedy" within the meaning of the Tax Injunction Act.

In addition to paying the disputed tax and then seeking a refund in state court, North Carolina taxpayers may challenge tax assessments through administrative review without first paying the tax. Under this process, a taxpayer may request an administrative hearing before the Secretary of Revenue in which he may present any objections to the proposed assessment. N.C. Gen. Stat. § 105-241.1. If the aggrieved

taxpayer does not obtain the desired relief from the Secretary of Revenue, he may "obtain from the Tax Review Board an administrative review with respect to the taxpayer's liability for the tax" without having to first pay the tax. N.C. Gen. Stat. § 105-241.2. Finally, the taxpayer may appeal the Tax Review Board decision to a state superior court upon payment of the tax. N.C. Gen. Stat. § 105-241.3.

North Carolina courts provide Lynn with a forum to raise his challenges to the Controlled Substance Act. The methods for challenging the tax set forth in N.C. Gen. Stat. §§ 105-267 and 105-241.1 through 105-241.3 provide Lynn with a "plain, speedy and efficient remedy" to challenge the tax assessed against him under the Controlled Substance Act. Because Lynn's Third, Fourth, Fifth, Sixth, and Tenth Claims for Relief seek to "enjoin, suspend or restrain the assessment, levy or collection" of a state tax, and North Carolina provides a "plain, speedy and efficient remedy" in its own courts, these claims are DISMISSED under the Tax Injunction Act.

D.

Finally, Defendants' argue that Lynn's First and Second Claims for Relief should be dismissed for lack of standing. Lynn's first two causes of action challenge the constitutionality of N.C. Gen. Stat. § 90-97, a provision of the Controlled Substances Act, which provides:

> Any penalty imposed for violation of this Article shall be in addition to, and not in lieu of, any civil

> or administrative penalty or sanction authorized by law. If a violation of this Article is a violation of a federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this State.

N.C. Gen. Stat. § 90-97.[3]

Defendants argue that Lynn lacks standing to bring these claims because Lynn was not prosecuted for a violation of the North Carolina Controlled Substances Act. In order to have standing, a plaintiff must establish that he has suffered an "injury in fact," which has a causal connection to the conduct complained of, and which is likely to be redressed by a decision in his favor. *Lujan*, 504 U.S. at 560-61.

In this case, Lynn does not have standing to challenge the constitutionality of N.C. Gen. Stat. § 90-97. Although Lynn may have suffered an injury in fact, that injury did not result from an application of section 90-97. The penalty assessed against Lynn was imposed under N.C. Gen. Stat. § 105-113.107, which Lynn challenges in other claims in the Complaint. Lynn has not shown a causal connection between

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[3]North Carolina's Controlled Substances Act and Controlled Substance Tax are codified in two separate chapters in the North Carolina General Statutes. The Controlled Substances Act is found in Chapter 90, Medicine and Allied Occupations, while the Controlled Substance Tax is found in Chapter 105, Taxation.

his injury and section 90-97, nor has he established that his injury will be redressed by a favorable decision. Lynn therefore lacks standing to challenge the constitutionality of section 90-97. Lynn's First and Second Claims for Relief are DISMISSED.

III.

In Summary, all of Plaintiffs' Claims for Relief are DISMISSED for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(1) and (6). The Eleventh Amendment bars all claims against the State of North Carolina and Plaintiffs' Ninth and Eleventh Claims for Relief for past constitutional violations. Plaintiffs' Seventh and Eighth Claims for Relief, individual-capacity claims asserted against Defendant West, are DISMISSED under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The Tax Injunction Act requires dismissal of Lynn's claims challenging the constitutionality of the Controlled Substance Tax. Finally, Lynn does not have standing to challenge the North Carolina Controlled Substances Act. Defendants' Motion to Dismiss Plaintiffs' Complaint is GRANTED.

This the 15th day of February, 1996.

/s/ N. Carlton Tilley, Jr.
United States District Judge

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ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING APPELLEES' PETITION FOR REHEARING, FILED FEBRUARY 9, 1998

Filed: February 9, 1998

United States Court of Appeals
For the Fourth Circuit

No. 96-1371

David L. Lynn, Jr.; Robin Dixon Lynn; Rodney Lynn; Roxanne Lynn; David L. Lynn, Sr.,

Plaintiffs-Appellants,

versus

Deborah West, in her individual capacity and official capacity as an agent of the State of North Carolina; Janice Faulkner, Secretary of Revenue, State of North Carolina, in her official capacity; State of North Carolina,

Defendants-Appellees.

ORDER

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

It is ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

The appellees have also filed a motion for a stay of mandate pending petition for certiorari to the Supreme Court. This Court grants the motion and stays the issuance of the mandate for thirty days pursuant to Federal Rule of Appellate Procedure 41 (b) .

Entered at the direction of Judge Michael with the concurrences of Judge Russell and Judge Widener.

For the Court,
/s/ Patricia S. Connor
Clerk

RELEVANT 1992 NORTH CAROLINA GENERAL STATUTES APPLICABLE TO THIS CASE

CHAPTER 105
ARTICLE 2D.

Schedule B-D. Controlled Substance Tax.

§ 105-113.105. Purpose.

The purpose of this Article is to levy an excise tax on persons who possess controlled substances and counterfeit controlled substances in violation of North Carolina law and to provide that a person who possesses such substances in violation of this Article is guilty of a felony. Nothing in this Article may in any manner provide immunity from criminal prosecution for a person who possesses an illegal substance. (1989, c. 772, s. 1.)

§ 105-113.106. Definitions.

The following definitions apply in this Article:

(1) Controlled Substance. - Defined in G.S. 90-87.

(2) Counterfeit Controlled Substance. - Defined in G.S. 90-87.

(3) Dealer. - A person who in violation of G.S. 90-95 possesses, delivers, sells, or manufactures more than 42.5 grams of marijuana, or seven or more grams of any other controlled substance or counterfeit controlled substance that is sold by weight, or 10 or more dosage units of any other

controlled substance or counterfeit controlled substance that is not sold by weight.

(4) Deliver. - Defined in G.S. 90-87.

(5) Manufacture. - Defined in G.S. 90-87.

(6) Marijuana. - Defined in G.S. 90-87.

(7) Person. - An individual or an entity that identifies itself as an entity and exists for a purpose, including a corporation, firm, partnership, institution or other unit.

(8) Secretary. - The Secretary of the Department of Revenue.

(1989, c. 772, s. 1)

§ 105-113.107. Excise tax on controlled substances.

An excise tax is levied on controlled substances and counterfeit controlled substances possessed by dealers at the following rates:

(1) At the rate of three dollars and fifty cents ($3.50) for each gram, or fraction thereof, of marijuana or counterfeit marijuana.

(2) At the rate of two hundred dollars ($200.00) for each gram, or fraction thereof, of any other controlled substance or counterfeit controlled substance that is sold by weight.

(3) At the rate of four hundred dollars ($400.00) for each 10 dosage units, or fraction thereof, of any other controlled substance or counterfeit controlled substance that is not sold by weight.

A quantity of marijuana or other controlled substance is measured by the weight of the substance whether pure or impure or dilute, or by dosage units when the substance is not sold by weight, in the dealer's possession. A quantity of a controlled substance is dilute if it consists of a detectable quantity of pure controlled substance and any excipients or fillers. (1989, c. 772, s. 1.)

§ 105-113.108. Reports; revenue stamps.

The Secretary shall issue stamps to affix to controlled substances and counterfeit controlled substances to indicate payment of the tax required by this Article. Dealers shall report the taxes payable under this Article at the time and on the form prescribed by the Secretary. Dealers are not required to give their name, address, social security number, or other identifying information on the form. Upon payment of the tax, the Secretary shall issue stamps in an amount equal to the amount of the tax paid. Taxes may be paid and stamps may be issued either by mail or in person. (1989, c. 772, S. 1.)

§ 105-113.109. When tax payable.

The tax imposed by this Article is payable by any dealer who possesses a controlled substance or counterfeit controlled substance in this State upon which the tax has not been paid, as evidenced by a stamp. The tax is payable within 48 hours after the dealer acquires a non-tax-paid controlled substance or counterfeit controlled substance, exclusive of Saturdays, Sundays, and legal holidays of this State, in which case the tax

is payable on the next working day. Upon payment of the tax, the dealer shall permanently affix the appropriate stamps to the controlled substance. Once the tax due on a controlled substance or counterfeit controlled substance has been paid, no additional tax is due under this Article even though the controlled substance or counterfeit controlled substance may be handled by other dealers. (1989, c. 772, s. 1.)

§ 105-113.110. Violations of Article a felony.

(a) A dealer who possesses marijuana or any other controlled substance or counterfeit controlled substance upon which the tax due under this Article has not been paid, as evidenced by a stamp, is guilty of a Class 1 felony.

(b) Notwithstanding any other provision of law, no prosecution for a violation of this Article shall be barred before the expiration of six years after the date of the violation. (1989, c. 772, s. 1; 1989 (Reg. Sess., 1990), c. 814, s. 6.)

§ 105-113.110A. Interest and penalty.

The tax due under this Article shall bear interest at the rate established pursuant to G.S. 105-241.1(I) from the date due until paid. In addition, a dealer who neglects, fails, or refuses to pay the tax due under this Article is liable for a penalty equal to one hundred percent (100%) of the tax. (1989 (Reg. Sess., 1990), c. 814, s. 7.)

§ 105-113.111. Assessments.

(a) Notwithstanding any other provision of law, an assessment against a dealer who possesses a controlled substance to which a stamp has not been affixed as required by this Article shall be made as provided in this section. The Secretary shall assess a tax, applicable penalties, and interest based on personal knowledge or information available to the Secretary. The Secretary shall notify the dealer in writing of the amount of the tax, penalty, and interest due, and demand its immediate payment. The notice and demand shall be either mailed to the dealer at the dealer's last known address or served on the dealer in person. If the dealer does not pay the tax, penalty, and interest immediately upon receipt of the notice and demand, the Secretary shall collect the tax, penalty, and interest pursuant to the procedure set forth in G.S. 105-241.1(g) for jeopardy assessments or the procedure set forth in G.S. 105-242, including causing execution to be issued immediately against the personal property of the dealer unless the dealer files with the Secretary a bond in the amount of the asserted liability for the tax, penalty, and interest. The Secretary shall use all means available to collect the tax, penalty, and interest from any property in which the dealer has a legal, equitable, or beneficial interest. The dealer may seek review of the assessment as provided in Article 9 of this Chapter.

(b) Reserved. (1989, c. 772, s. 1; 1989 (Reg. Sess., 1990), c. 1039, s. 2; 1991 (Reg. Sess., 1992), c. 900, s. 20(d).)

§ 105-113.112. (Effective until January 1, 1995) Confidentiality of information.

Notwithstanding any other provision of law, information obtained pursuant to this Article is confidential and may not be disclosed or, unless independently obtained, used in a criminal prosecution other than a prosecution for a violation of this Article. Stamps issued pursuant to this Article may not be used in a criminal prosecution other than a prosecution for a violation of this Article. A person who discloses information obtained pursuant to this Article is guilty of a misdemeanor. This section does not prohibit the Secretary from publishing statistics that do not disclose the identity of dealers or the contents of particular returns or reports. (1989, c. 772, s. 1.)

§ 105-113.113. Use of tax proceeds.

The Secretary shall credit the proceeds of the tax levied by this Article to a special nonreverting account, to be called the State Controlled Substances Tax Account, until the tax proceeds are unencumbered. Tax proceeds are unencumbered when the taxpayer no longer has a current right to challenge the assessment of the tax.

The Secretary shall, on quarterly basis, remit the unencumbered tax proceeds as follows: seventh-five percent (75%) of the amount collected by assessment shall be remitted to the State or local law enforcement agency that conducted the investigation of a dealer that led to the assessment; and the remainder of the unencumbered tax proceeds shall be credited to the General Fund. If more than one State or local law

enforcement agency conducted the investigation, the Secretary shall determine the equitable pro rata share for each agency based on the contribution each agency made to the investigation. (1991 (Reg. Sess., 1992), c. 900, s. 20(c).)

ARTICLE 9

§ 105-241.1. Additional taxes; assessment procedure.

(a) If the Secretary of Revenue discovers from the examination of any return or otherwise that any tax or additional tax is due from any taxpayer, he shall give notice to the taxpayer in writing of the kind and amount of tax which is due and of his intent to assess the same, which notice shall contain advice to the effect that unless application for a hearing is made within the time specified in subsection (c), the proposed assessment will become conclusive and final.

If the Secretary is unable to obtain from the taxpayer adequate and reliable information upon which to base such assessment, the assessment may be made upon the basis of the best information available and, subject to the provisions hereinafter made, such assessment shall be deemed correct.

(b) The notice required to be given in subsection (a) may be delivered to the taxpayer by an agent of the Secretary or may be sent by mail to the last known address of the taxpayer and such notice will be deemed to have been received in due course of the mail unless the taxpayer shall make an affidavit to the contrary within 90 days after such notice is mailed, in which event the taxpayer shall be heard by the Secretary in all respects as if he had made timely application.

(c) Any taxpayer who objects to a proposed assessment of tax or additional tax shall be entitled to a hearing before the Secretary of Revenue provided application therefor is made in writing within 30 days after the mailing or delivery of the notice required by subsection (a). If application for a hearing is made in due time, the Secretary of Revenue shall set a time and place for the hearing and after considering the taxpayer's objections shall give written notice of his decision to the taxpayer. The amount of tax or additional tax due from the taxpayer as finally determined by the Secretary shall thereupon be assessed and upon assessment shall become immediately due and collectible.

Provided, the taxpayer may request the Secretary at any time within 30 days of notice of such proposed assessment for a written statement, or transcript, of the information and the evidence upon which the proposed assessment is based, and the Secretary of Revenue shall furnish such statement, or transcript, to the taxpayer. Provided, further, after request by the taxpayer for such written statement, or transcript, the taxpayer shall have 30 days after the receipt of the same from the Secretary of Revenue to apply in writing for such hearing, explaining in detail his objections to such proposed assessment. If no request for such hearing is so made, such proposed assessment shall be final and conclusive.

(d) If no timely application for a hearing is made within 30 days after notice of a proposed assessment of tax or additional tax is given pursuant to subsection (a), such proposed tax or additional tax assessment shall become final

without further notice and shall be immediately due and collectible.

(e) Where a proper application for a license or a return has been filed and in the absence of fraud, the Secretary of Revenue shall assess any tax or additional tax due from a taxpayer within three years after the date upon which such application or return is filed or within three years after the date upon which such application or return was required by law to be filed, whichever is the later. Any tax or additional tax due from the taxpayer may be assessed at any time if (I) no proper application for a license or no return has been filed, (ii) a false or fraudulent application or return has been filed, or (iii) there has been an attempt in any manner to fraudulently defeat or evade tax.

Provided, the taxpayer may make a written waiver of any of the limitations of time set out in this section, for either a definite or indefinite time, and if such waiver is accepted by the Secretary he may institute assessment procedures at any time within the time extended by such waiver. This proviso shall apply to assessments made or undertaken under any provision of all schedules of the Revenue Act, and to assessments under Subchapter V of Chapter 105 and Chapter 18 of the General Statutes.

(f) Except as hereinafter provided in subsection (g), the Secretary of Revenue shall have no authority to assess any tax or additional tax under this section until the notice required by subsection (a) shall have been given and the period within which an application for a hearing may be filed has expired, or if a timely application for a hearing is filed, until written notice

of the Secretary's decision has been given to the taxpayer, provided, however, that if the notice required by subsection (a) shall be mailed or delivered within the limitation prescribed in subsection (e), such limitation shall be deemed to have been complied with and the proceeding may be carried forward to its conclusion.

(g) Notwithstanding any other provision of this section, the Secretary of Revenue shall have authority at any time within the applicable period of limitations to proceed at once to assess any tax or additional tax which he finds is due from a taxpayer if, in his opinion, the collection of such tax is in jeopardy and immediate assessment is necessary in order to protect the interest of the State, provided, however, that if an assessment is made pursuant to the authority set forth in this subsection before the notice required by subsection (a) is given, such assessment shall not be valid unless the notice required by subsection (a) shall be given within 30 days after the date of such assessment.

(h) The rules of evidence do not apply in a hearing before the Secretary of Revenue under this section. G.S. 105-241.2, 105-241.3, and 105-241.4 apply to a tax or additional tax assessed under this section.

(i) All assessments of taxes or additional taxes, exclusive of penalties assessed thereon, shall bear interest from the time the taxes or additional taxes were due until paid. On or before June 1 and December 1 of each year, the Secretary of Revenue shall establish the interest rate to be in effect during the six-month period beginning on the next succeeding July 1 and January 1, respectively, after giving due consideration to

current market conditions and to the rate that will be in effect on that date pursuant to the Internal Revenue Code. If no new rate is established, the rate in effect during the preceding six-month period shall continue in effect. The rate established BV the Secretary may not be less than five percent (5%) per year and may not exceed sixteen percent (16%) per year. For refunds and assessments made between July 1, 1982, and December 31, 1982, the rate shall be twelve percent (12%) per year.

From and after January 1, 1978, interest upon assessments and upon additional taxes shall be computed at the rate established by G.S. 105-241.1(I)and shall be computed without regard to any former rate of interest which might have been established by G.S. 105-241.1 for the taxable period for which said assessment was made, or for the period within which said taxes were due to be paid.

(il) "Tax" and "additional tax," for the purposes of this Subchapter and for the purposes of Subchapters V and VIII of this Chapter, include penalties and interest, as well as the principal amount of such tax or additional tax.

(j) This section is in addition to and not in substitution of any other provision of the General Statutes relative to the assessment and collection of taxes and shall not be construed as repealing any other provision of the General Statutes. (1949, c. 392. s. 6; 1951, c. 643, s. 9; 1955, c. 1350, s. 23; 1957, c. 1340, s. 10; 1959, c. 1259, s. S; 1969, c. 1132, s. 1; 1973, c. 476, s. 193; c. 1287, s. 13; 1977, c. 657, s. 6; c. 1114, ss. 1, 11; 1981 (Reg. Sess., 1982), c. 1211, s. 2; c. 1223. s. 4; 1987, c. 827, s. 21; 1989, c. 530.)

§ 105-241.2. Administrative review.

(a) Without having to pay the tax or additional tax assessed by the Secretary under this Chapter, any taxpayer may secure from the Tax Review Board an administrative review with respect to his liability for the tax or additional tax assessed by the Secretary. Such a review may be obtained only if the taxpayer has obtained a hearing before the Secretary and the Secretary has rendered a final decision with respect to the taxpayer's liability. To obtain such review the taxpayer shall:

(1) File with the Tax Review Board, with a copy to the Secretary, notice of intent to file a petition for review, such notice to be filed within 30 days after notice of the Secretary's final decision is issued; and

(2) File with the Tax Review Board, with a copy to the Secretary, a petition requesting administrative review and stating in concise terms the grounds upon which review is sought, such petition to be filed within 60 days after the expiration of the period provided in subdivision (1) for filing of notice of intent to petition for review.

(b) Upon receipt by the Secretary of the taxpayer's petition, the Secretary shall transmit to the Tax Review Board all of the records, data, evidence and other materials which he has pertaining to the matters which the Tax Review Board is being requested by the taxpayer to review. He shall also transmit to the Board a copy of his decision respecting such matters. The Tax Review Board shall fix a time for reviewing

the Secretary's decision and shall hear the same in the City of Raleigh. The Board shall give notice of the time and place of such hearing to the petitioner and to the Secretary at least 10 days prior thereto. Officers and employees of the Revenue Department, when so requested by the Board, shall attend hearings on such reviews and shall furnish the Board with all information they have respecting the asserted liability. The Tax Review Board man establish by regulation the procedure to be followed in hearings before it and is authorized to establish BV regulations a schedule of costs of the proceedings. At least two members of the Board shall sit at the hearing and all members shall consider and decide the matters on review. The Board shall confirm, modify, reverse, reduce, or increase the assessment or decision of the Secretary, and it shall furnish a written copy of its order to the Secretary and shall serve a written copy of its order upon the taxpayer by personal service or by registered mail (return receipt requested). In the event the decision of the Tax Review Board should not result in a reduction of the tax liability asserted by the Secretary to be due, or if the Tax Review Board should dismiss the petition under the provisions of subsection (c) of this section, the costs of the proceeding shall be added to and shall become a part of the tax liability to be collected by the Secretary. In the event the decision of the Tax Review Board should result in a reduction of the tax liability asserted by the Secretary to be due, no costs shall be taxed against the taxpayer.

(c) Upon receipt of a petition requesting administrative review as provided in the preceding subsection, the Tax Review Board shall examine the petition and the records and other data

transmitted by the Secretary pertaining to the matter for which review is sought, and if it should appear from such records and data that the petition is frivolous or filed for purpose of delay, the Tax Review Board shall dismiss the petition for review and, in addition, is authorized, in its discretion, to impose a penalty not to exceed one hundred dollars ($100.00), which penalty shall be in addition to the tax, penalties, interests, and costs, and shall be collected in the same manner as the principal tax liability.

(d) Any taxpayer may also apply to the Tax Review Board under the provisions of this section for administrative review of the decision of the Secretary of Revenue with respect to an alleged overpayment of tax imposed by this Chapter provided such taxpayer has filed a demand in writing for refund of such overpayment within the time allowed by law for the filing of such demand and the Secretary has issued a decision denying the claimed refund. To obtain such review the taxpayer shall file notice of intent to petition for review with the Tax Review Board, with copy to the Secretary, within 30 days after issuance of the Secretary's decision. The taxpayer shall also perfect the application for review by filing with the Tax Review Board, with a copy to the Secretary, a petition requesting administrative review and stating in concise terms the grounds upon which review is sought. Such petition shall be filed within 60 days after expiration of the period provided for filing notice of intent to petition for review. The Tax Review Board shall consider and dispose of the petition for review in the manner provided in subsection (b) for the consideration and disposition of petitions for review of any tax

or additional tax assessed by the Secretary. No costs shall, however, be taxed against the taxpayer if the decision of the Tax Review Board results in a refund to the taxpayer. Any overpayment of tax determined by the decision of the Tax Review Board, together with interest thereon at the rate and for the period provided under G.S. 105-266, shall be refunded by the State.

(e) At any time the Secretary of Revenue shall have authority, if in his opinion, such action is necessary for the protection of the interest of the State, to proceed at once to levy the assessment for the amount of the tax against the property of the taxpayer seeking the administrative review. In levying said assessment the Secretary shall make a certificate setting forth the essential parts relating to the tax, including the amount thereof asserted to be due, the date when same is asserted to have become due and payable, the person, firm, or corporation chargeable therewith, and the nature of the tax. Under his hand and seal the Secretary shall transmit said certificate to the clerk of the superior court of any county in which the taxpayer resides or has property; whereupon, it shall be the duty of the clerk of the superior court of the county to docket the said certificate and to index the same on the cross index of judgments. When so docketed and indexed, said certificate of tax liability shall constitute a lien upon the property of the taxpayer to the same extent as that provided for by G.S. 105-241. No execution shall issue on said certificate before final determination of the administrative review by the Tax Review Board; provided, however, if the Secretary determines that the collection of the tax would be jeopardized by delay, he may

cause execution to be issued, as provided in this Chapter, immediately against the personal property of the taxpayer unless the taxpayer files with the Secretary a bond in the amount of the asserted liability for tax, penalty and interest. If upon such final administrative determination the tax asserted or any part thereof is sustained, execution may issue on said certificate at the request of the Secretary of Revenue, and the sheriff shall proceed to advertise and sell the property of the taxpayer.

(f) Taxpayers seeking administrative review of liability decisions of the Commissioner of Insurance under Article 8B of this Subchapter shall follow the procedure prescribed in subsection (a) of this section for taxpayers seeking administrative review of decisions of the Secretary of Revenue. In such cases all provisions of this section referring to the Secretary of Revenue shall be considered as applying to the Commissioner of Insurance. (1955, c. 1350, s. 5; 1957, c. 1340, s. 10; 1973, c. 476, s. 193.)

§ 105-267. Taxes to be paid; suits for recovery of taxes.

No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and such payment shall be without prejudice to any defense of rights he may have in the premises. At any time within 30 days after payment, the

taxpayer may demand a refund of the tax paid in writing from the Secretary of Revenue and if the same shall not be refunded within 90 days thereafter, may sue the Secretary of Revenue in the courts of the State for the amount so demanded. Such suit may be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides at any time within three years after the expiration of the 90-day period allowed for making the refund. If upon the trial it shall be determined that such a tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of taxes for which judgment shall be rendered in such action shall be refunded by the State; provided, nothing in this section shall be construed to conflict with or supersede the provisions of G.S. 105-241.2. (1939, c. 158, s. 936; 1955, c. 1350, s. 15; 1957, c. 1340, s. 10; 1977, c. 946, s. 1.)

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RELEVANT 1995 NORTH CAROLINA GENERAL STATUTE PERTAINING TO PENALTY

§ 105-113.107. Excise tax on controlled substances.

An excise tax is levied on controlled substances possessed, either actually or constructively, by dealers at the following rates:

(1) At the rate of forty cents (40¢) for each gram, or fraction thereof, of harvested marijuana stems and stalks that have been separated from and are not mixed with any other parts of the marijuana plant.

(1a) At the rate of three dollars and fifty cents ($3.50) for each gram, or fraction thereof, of marijuana, other than separated stems and stalks taxed under subdivision (1) of this section.

(2) At the rate of two hundred dollars ($200.00) for each gram, or fraction thereof, of any other controlled substance that is sold by weight.

(2a) At the rate of fifty dollars ($50.00) for each 10 dosage units, or fraction thereof, of any low-street-value drug that is not sold by weight.

(3) At the rate of four hundred dollars ($400.00) for each 10 dosage units, or fraction thereof, of any other controlled substance that is not sold by weight.

A quantity of marijuana or other controlled substance is measured by the weight of the substance whether pure or

impure or dilute, or by dosage units when the substance is not sold by weight, in the dealer's possession. A quantity of a controlled substance is dilute if it consists of a detectable quantity of pure controlled substance and any excipients or fillers. (1989, c. 772, s. 1.; 1995, c. 340, s. 1.)

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In the

Supreme Court of the United States

October Term, 1997

DEBORAH WEST, *et al.*,
Petitioners,

v.

DAVID L. LYNN, JR., *et al.*
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

AMICI CURIAE BRIEF OF THE STATES OF KANSAS, ALABAMA, IDAHO, IOWA, KENTUCKY, LOUISIANA, MASSACHUSETTS, MONTANA, NEBRASKA, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA AND WISCONSIN IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTION PRESENTED

1. May a state both collect a tax and impose a punishment on possession of a controlled substance without violating the Double Jeopardy Clause?

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In the

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DEBORAH WEST, *et al.*,
Petitioners,

v.

DAVID L. LYNN, JR., *et al.*
Respondents.

AMICI CURIAE BRIEF OF THE STATES OF KANSAS, ALABAMA, IDAHO, IOWA, KENTUCKY, LOUISIANA, MASSACHUSETTS, MONTANA, NEBRASKA, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA AND WISCONSIN IN SUPPORT OF THE PETITION FOR CERTIORARI

The States of Kansas, Alabama, Idaho, Iowa, Kentucky, Louisiana, Massachusetts, Montana, Nebraska, Oklahoma, Rhode Island, South Carolina and Wisconsin respectfully file this brief *amici curiae*, pursuant to Supreme Court Rule 37.4. The brief is submitted in support of the petition for writ of certiorari filed in this case by the State of North Carolina.

INTEREST OF *AMICI CURIAE*

Kansas and its sister states have a direct interest in North Carolina's petition because the decision below either threatens each state's past and future collection of a drug tax against persons prosecuted for possession of illegal drugs or constrains state legislatures from adopting such a tax

altogether. The legislatures of twenty states have enacted some form of a tax on illegal substances.[1] The court of appeals has now made criminal a class of statutes state legislatures have intended as civil. That court also failed to take into account whether the North Carolina legislature has indicated either expressly or impliedly an intent to establish the tax as a civil or criminal penalty, undermining this Court's decision in *Hudson v. United States*, 522 U.S. ___ at ___, 118 S. Ct. ___ at ___, 139 L. Ed. 2d 450 at 459 (1997).

The court of appeals' decision forces states to choose between collecting revenue from drug dealers through a drug tax or prosecuting the dealers for possession of illicit drugs. It does not permit a state to do both in separate proceedings

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[1] ALA. CODE § 40-17A-1 to § 40-17A-16 (1993 and Supp. 1997); CONN. GEN. STAT. § 12-650 to § 12-659 (1993 and Supp. 1998); GA. CODE ANN. § 48-15-1 to § 48-15-11 (1995); IDAHO CODE § 63-4201 to § 63-4211 (1996); IND. CODE. ANN. § 6-7-3-1 to § 6-7-3-20 (Michie 1996); IOWA CODE § 453B.1 to § 453B.16 (Supp. 1998); KAN. STAT. ANN. § 79-5201 to § 79-5212 (1997); KY. REV. STAT. ANN. § 138.870 to § 138.889 (1998); LA. REV. STAT. ANN. § 47:2601 to § 47:2610 (Supp. 1998); MASS. GEN. LAWS ANN. ch. 64K, § 1 to § 14 (Supp. 1998); MINN. STAT. § 297D.01 to § 297D.14 (1991); NEB. REV. STAT. § 77-4301 to § 77-4316 (1996); NEV. REV. STAT. ANN. § 372A.010 to § 372A.130 (1997); N.C. GEN. STAT. § 105-113.105 to § 105-113.113 (1997); OKLA. STAT. tit. 68, § 450.1 to § 450.9 (1992 and Supp. 1998); R.I. GEN. LAWS § 44-49-1 to § 44-49-10 (1995); S.C. CODE ANN. § 12-21-5010 to § 12-21-6050 (1997); TEX. TAX CODE ANN. § 159.001 to § 159.206 (West 1992 and Supp. 1998); UTAH CODE ANN. § 59-19-101 to § 59-19-107 (1996); WIS. STAT. ANN. § 139.87 to § 139.96 (West 1995-96 and Supp. 1997-98).

without violating the Double Jeopardy Clause. As a consequence, either an important source of revenue will be lost[2] or dangerous drug defendants will escape prosecution.

STATEMENT OF THE CASE

Amici States agree with petitioner North Carolina's Statement of the Case and adopt it as if set forth fully here. *Amici* stress only the following points:

In 1996, the North Carolina Court of Appeals held that "the North Carolina Controlled Substance Tax does not have such fundamentally punitive characteristics as to render it

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[2] States have a legitimate and compelling interest in raising revenue by taxing drug activity. State and local governments spend an estimated $15.9 billion each year on investigating, apprehending, prosecuting and incarcerating persons dealing in controlled substances. OFFICE OF NATIONAL DRUG CONTROL POLICY WHITE PAPER, STATE AND LOCAL DRUG SPENDING ON DRUG CONTROL ACTIVITIES, p. 3 (October, 1993).

State and local economies also bear the economic burden of the consequence of drug activity, such as the treatment of substance abuse, costs associated with the destruction of property and crime, productivity loss as a result of drug abuse, and treatment of AIDS attributable to drug abuse. For example, in 1990, these costs for the State of Iowa were estimated to be over $732 million. IOWA DEPARTMENT OF PUBLIC HEALTH, DIVISION OF SUBSTANCE ABUSE, SOCIETAL COSTS OF SUBSTANCE ABUSE IN IOWA (1995), relying on INSTITUTE FOR HEALTH POLICY, BRANDEIS UNIVERSITY FOR THE ROBERT WOOD JOHNSON FOUNDATION, SUBSTANCE ABUSE: THE NATION'S NUMBER ONE HEALTH PROBLEM (October, 1993).

violative of the prohibition against multiple punishments for the same offense contained in the Double Jeopardy Clause." *State v. Ballenger*, 472 S.E.2d 572, 575 (1996), *aff'd per curiam*, 481 S.E.2d 84 (1997), *cert. denied*, __ U.S. __, 118 S. Ct. 68 (1997). In its *per curiam* decision, the North Carolina Supreme Court distinguished North Carolina's tax from the one this Court examined in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994), on the grounds that (1) North Carolina's tax is not predicated upon whether the taxpayer has been arrested or charged with criminal conduct, and (2) the tax is not assessed on property that has been confiscated or destroyed. Under *Ballenger*, the state could and did civilly assess and collect controlled substance taxes, and in an independent criminal proceeding prosecuted drug dealers for possession of drugs for which they had been taxed.

In 1998, the United States Court of Appeals for the Fourth Circuit addressed the question of whether North Carolina's tax is a criminal penalty, and with only passing reference to *Ballenger*, decided the issue contrary to it. The court of appeals concluded that the tax is based on a criminal act and has no relationship to lawful possession of the taxed substance. As a consequence, it held that North Carolina's tax on possession of controlled substances is a criminal penalty, requiring adherence to all the constitutional safeguards of criminal proceedings. The state stopped enforcing its drug tax on the day the court of appeals rendered its decision.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF SEVERAL STATE COURTS OF LAST RESORT.

The United States Court of Appeals for the Fourth Circuit has entered a decision on a question of constitutional criminal law which directly conflicts with an existing decision of the highest court of the State of North Carolina and the highest courts of the states of Alabama, Connecticut, Iowa, Kansas, Oklahoma, and South Carolina.[3] The state courts have held that a state may levy a civil tax on illicit drugs and independently criminally prosecute the person who possessed those drugs. Petitioner North Carolina explains well these existing conflicts, and they will not be restated here. In order

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[3] *Wilhite v. State*, 689 So. 2d 221 (Ala. Crim. App. 1996), *cert. denied*, (Ala. 1997); *S.H.J. v. State Dep't of Revenue*, 682 So. 2d 1354 (Ala. Civ. App. 1995), *cert. denied* (Ala. 1996); *Milner v. State*, 658 So. 2d 500 (Ala. Civ. App. 1994), *cert. denied* (Ala. 1995); *Covelli v. Commissioner of Revenue Servs.* ("*Covelli I*"), 668 A.2d 699 (Conn. 1995), *vacated and remanded sub nom. Covelli v. Crystal*, ___ U.S. ___, 116 S. Ct. 2577 (for further consideration in light of this Court's decision in *United States v. Ursery*, 518 U.S. ___, 116 S. Ct. 2135 (1996)), *aff'd per curiam on reconsideration, Covelli v. Commissioner of Revenue Servs.* ("*Covelli II*"), 683 A.2d 737 (Conn. 1996), *cert. denied, Covelli v. Crystal*, ___ U.S. ___, 117 S. Ct. 1445 (1997); *State v. Lange*, 531 N.W.2d 108 (Iowa 1995); *State v. Gulledge*, 896 P.2d 378 (Kan. 1995); *Hill v. State*, 898 P.2d 155 (Okla. Crim. App. 1995); *McMullin v. South Carolina Dep't of Revenue and Taxation*, 469 S.E.2d 600 (S.C. 1996).

to resolve this conflict between state and federal court interpretation of the same question of constitutional criminal protection, this Court should grant the State of North Carolina's petition for writ of certiorari.

II. THE COURT OF APPEALS MISAPPLIED *KURTH RANCH* IN ERRONEOUSLY CONCLUDING THAT A STATE'S ASSESSMENT OF A DRUG TAX IS ALWAYS A CRIMINAL PENALTY.

The critical factor that led this Court to conclude that Montana's drug tax was motivated by a penal and prohibitory intent was that the taxpayer was obligated to pay the tax only upon arrest. Montana's Drug Tax Act and accompanying administrative rules provided for no other possible circumstances under which the tax was to be assessed and paid. "The Montana tax was unique in that it was conditioned on the commission of a crime and was imposed only after the taxpayer had been arrested: thus, only a person charged with a criminal offense was subject to the tax." *United States v. Ursery*, 518 U.S. 267, 282 (1996).

Under the statutes of Alabama, Connecticut, Idaho, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Nebraska, Oklahoma, South Carolina, Utah, and Wisconsin,[4] as

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[4] ALA. CODE § 40-17A-4 (1993 and Supp. 1997); CONN. GEN. STAT. § 12-651(c)(1993 and Supp. 1998); IDAHO CODE § 63-4203 (1996); IOWA CODE § 453B.3 (Supp. 1998); KAN. STAT. ANN. § 79-5204(d)(1997); KY.

well as North Carolina, persons subject to the tax are those engaging in illegal drug activities, *e.g.*, possession or sale of illicit drugs. Taxpayers are obligated by statute to pay the tax regardless of their arrest for the illegal activity. Indeed, the North Carolina statute provides that taxpayers may pay the tax without risk of arrest.

The court of appeals attempts to avoid this crucial distinction by cavalierly stating that "the theoretical possibility that a drug dealer could pay the tax does not take the tax out of the criminal penalty category. The unused statutory reporting and payment scheme, while clever, is not enough to distinguish *Kurth Ranch*." *Lynn v. West*, 134 F.3d 582, 591 (4th Cir. 1998). Ignoring this important distinction results in no state drug tax being able to pass muster under *Kurth Ranch*, because all will be characterized as criminal penalties under the Fourth Circuit's flawed analysis.

REV. STAT. ANN. § 138.870(4)(1998); LA. REV. STAT. ANN. § 47:2602(2) (Supp. 1998); MASS. GEN. LAWS ANN. ch. 64K, § 1 (Supp. 1998); MINN. STAT. § 297D.04 (1991); NEB. REV. STAT. § 77-4302(1996); OKLA. STAT. tit. 68, § 450.3 (1992 and Supp. 1998); S.C. CODE ANN. § 12-21-6020(B)(1997); UTAH CODE ANN. § 59-19-102 (1996); WIS. STAT. ANN. § 139.87 (2) (West Supp. 1997-98).

III. THE COURT OF APPEALS' ERRONEOUS DECISION COULD HAVE THE UNDESIRABLE CONSEQUENCE OF THE RELEASE OF DRUG DEALERS NOW IN CUSTODY, BASED ON PRINCIPLES OF DOUBLE JEOPARDY.

One of the most disturbing aspects of the court of appeals' decision is that states face the specter of the potential release of thousands of drug dealers from prison based on the erroneous decision of the court of appeals. Drug dealers in custody who were assessed the drug tax and prosecuted for possession of drugs may be released on Double Jeopardy principles on the ground that prosecuting them criminally after collecting the drug tax amounts to a double punishment for the same offense. 28 U.S.C. § 2254. Unless this Court grants the petition for writ of certiorari, the court of appeals' interpretation of *Kurth Ranch* will stand as a reasonable application of federal law, which may result in serious consequences to states in their responses to federal habeas petitions. 28 U.S.C. § 2254(d)(1).

CONCLUSION

The petition for a writ of certiorari should be granted.

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In The

Supreme Court of the United States

October Term, 1997

DEBORAH WEST, in her individual capacity and official capacity as an agent of the State of North Carolina; JANICE FAULKNER, Secretary of Revenue, State of North Carolina, in her official capacity; STATE OF NORTH CAROLINA,

Petitioners,

vs.

DAVID LYNN, JR.; ROBIN DIXON LYNN; RODNEY LYNN; ROXANNE LYNN; DAVID L. LYNN, SR.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

1. Did the court below correctly apply this Court's holding in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994) finding that, "the Drug Tax may not be enforced absent the constitutional safeguards that attach to criminal proceedings."?

2. Did the court below correctly find that the Tax Injunction Act, 28 U.S.C. § 1341 does not apply, "A criminal penalty, however labeled, is not a 'tax under State law' for Tax Injunction Act purposes."?

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The plaintiffs/respondents, David L. Lynn, Jr.; Robin Dixon Lynn; Roxanne Lynn; and David L. Lynn, Sr., respectfully file this brief in opposition of the petition for writ of certiorari filed by the State of North Carolina. Certiorari should be denied.

Faithfully applying this Court's analysis in both *Kurth Ranch* and *Hudson,* the lower court found the North Carolina Drug Tax is a criminal penalty not a civil remedy and therefore could only be imposed with the constitutional safeguards required of criminal sanctions. Contrary to petitioners' exaggerated claim, the lower court neither "adopted a simplistic" approach to the issue nor "made no effort to apply factors traditionally employed to determine whether particular legislation is" criminal despite being labeled civil. Petition for Certiorari at 11, 14. Rather, the lower court charted a course remarkably consistent with this Court's recent disavowal of a case-by-case approach to the issue at hand in favor of a categorical assessment. *Hudson,* 139 L. Ed. 2d 456-57, 459-60 (disavowing *United Sates v. Halper,* 490 U.S. 435, 448 (1989) in favor of factors articulated in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 169 (1963)). This well-reasoned analysis presents no issue of constitutional significance meriting certiorari review. This Court has just reaffirmed the *Kurth Ranch* analysis in *Hudson* and endorsed the *Mendoza-Martinez* criteria as the guideposts for determining when a civil remedy attains a sufficiently punitive character to trigger the constitutional protections required before a criminal penalty may be imposed. The Fourth Circuit followed *Hudson.* Accordingly, no need exists for review by the Court.

STATEMENT OF THE CASE

On March 1, 1993, the Rockingham County Sheriff's Office, agents of the United States Government, and agents of the North Carolina Department of Motor Vehicles, searched the

residence of David L. Lynn, Jr. ("Respondent") at 2995 Wentworth Street, City of Reidsville, Rockingham County, North Carolina. During the search of Lynn's residence a quantity of cocaine was found by the agents. Before executing said search, agents of the State of North Carolina as outlined above obtained a warrant to search the residence of David L. Lynn, Jr. The search warrant was obtained using conflicting information received from David L. Lynn and for the purpose of searching the residence to find controlled substances.

Prosecution of the Respondent commenced on March 1, 1993, when he was arrested and charged by Officers of the Rockingham County Sheriff's Department for a violation of the North Carolina controlled substances laws.[1]

On March 2, 1993, Janice Faulkner in her official capacity as Secretary of Revenue issued a notice of controlled substance attached assessment and a certificate of tax liability.

On March 4, 1993, the North Carolina Department of Revenue caused a writ of execution to be issued in a court for the Superior Court of Rockingham County.

On the 18th day of March 1993, Respondent filed an Objection to Assessment and Application For Hearing with the North Carolina Department of Revenue. On April 12, 1993, before hearing was held on said objection, agents of Petitioner seized items of personal property belonging to Respondent from his residence.

On March 23, 1993, United States Attorney's Office for the Middle District of North Carolina filed a civil in-rem forfeiture complaint against various items of property allegedly

1. Those charges were subsequently dismissed after Lynn's trial on the same charges in federal court.

belonging to Respondent. Among the items of property that was sought to be forfeited by the United States Attorney's Office was a commercial building located at State Highway Number 87 and 65 West of the Corporate Limits of the City of Reidsville, North Carolina ("Radio Station"), one Mercedes Benz automobile VIN#0704412032106, and one Mitsubishi automobile VIN#JA3XE74C2NY063332, said forfeitures occurring in cases numbered 2:93CV171 and 2:93CV172.(JA-10) Notice by Publication was given to all persons claiming an interest in the property or else be defaulted, including the State of North Carolina. The Petitioner chose not to assert their claim in either of these actions.

On March 29, 1993, Respondent was indicted by the United States District Court for the Middle District of North Carolina for possession with intent to distribute controlled substances.

On June 16, 1993, Respondent was convicted following a jury trial in United States District Court. Additionally the jury found that the residence at 2995 Wentworth Street should be criminally forfeited.

The forfeitures went to hearing and were resolved by the United States District Court of the Middle District of North Carolina on or about November 1993. All non-appearing parties were defaulted, including the State of North Carolina. As a result of the decision of the United States District Court, the property was ordered turned over to Terry Harn, Attorney at Law, for distribution to the appropriate owners.

Prior to the search and arrest, respondent had executed a contract conveying the Mitsubishi automobile referred to above to Robin Dixon (now Robin Dixon Lynn) for good and valuable consideration. Robin Dixon subsequently married Respondent and became entitled to the exclusive ownership of the Mitsubishi

automobile. As part of the proceedings and the forfeiture action, Robin Dixon testified in deposition to all matters involved in the transfer of the Mitsubishi automobile including her contract with Respondent.

On March 11, 1994, A. Wayne Harrison, an attorney representing David L. Lynn, Jr., communicated with Mr. Michael Hanna, an officer of the North Carolina Department of Revenue in an attempt to further the claim of David L. Lynn, Jr. for the return of property previously seized and in an attempt to eliminate the levy of the North Carolina controlled substances act. On March 14, 1994, Harrison was notified that he could submit his argument in support of David Lynn's position to the North Carolina Department of Revenue, an agency of the executive department of the State of North Carolina, in written form without appearing.

On March 31, 1994, Harrison submitted a written statement of objections to the assessment of the North Carolina controlled substances tax act, said objections including but not limited to an assertion of the unconstitutional seizure under the Fourth Amendment of the United States Constitution and further alleging that the imposition of the drug tax was a violation of the double jeopardy clause of the United States Constitution.

On May 9, 1994, Hanna issued his final decision. The decision did not discuss the constitutional questions raised by Harrison. Hanna had previously indicated he would not consider Constitutional objections. The Controlled Substances Act prohibited him from considering these objections.

On August 9, 1994, Deputy of the United States Marshall John Spray called Terry Harn to advise him that the Mercedes automobile could be released and requested that Harn agree to turn the vehicle over to Deborah West. The Mercedes automobile

is lawfully titled to Rodney Lynn, petitioner in this case. Deborah West seized said automobile pursuant to some process issued by the North Carolina Department of Revenue.

REASONS FOR DENYING THE WRIT

This Court should deny a writ of certiorari because the lower court correctly applied in both *Kurth Ranch* and *Hudson* in finding that the North Carolina drug tax is a criminal penalty requiring the protections afforded by both the Fifth and Sixth Amendments. A fact ignored by petitioners is that the primary thrust of *Hudson* was to disavow the analysis in *Halper*. Indeed, the lower court neither discussed nor cited *Halper* in its analysis of this issue. The lower court relied primarily upon the analysis in *Kurth Ranch*. Critically, and wholly ignored by petitioners, *Hudson* did not disavow *Kurth Ranch* in any way. In fact, *Hudson* acknowledged that the "ill considered" analysis in *Halper* had proved unworkable in *Kurth Ranch*. 139 L. Ed. 2d at 460-61. *Hudson* cited with approval the analysis by the *Kurth Ranch* majority that *Halper* did not decide the very different question at issue in *Kurth Ranch*. *Id.* Furthermore, the *Hudson* majority recognized that the presence of a deterrent purpose or effect is not dispositive of that issue at hand, a position contrary to *Halper*. *Hudson* recognized that *Kurth Ranch* had not followed *Halper* but had, instead, "applied a *Kennedy*-like test." *Hudson* 139 L. Ed. 2d at 461 n.6. *Hudson* adopted this very test applied in *Kurth Ranch*. Thus, the Fourth Circuit faithfully applied *Kurth Ranch* to the extent that it necessarily faithfully applied *Hudson* contrary to petitioners' mistaken impression

Unquestionably, *Hudson* adopts the *Mendoza-Martinez* paradigm as the appropriate test for determining whether a statute characterized as imposing a civil sanction or remedy actually crosses the line and imposes a criminal penalty or punishment.

Certiorari is likewise not warranted because of the lower court's treatment of the Tax Injunction Act. As the lower court correctly recognized, this statute prohibits a district court from exercising jurisdiction over an action to enjoin, suspend or restrain a tax under state law where the state provides a plain, speedy, and efficient remedy. Applying the *Hudson/Kurth Ranch/Mendoza-Martinez* test to the North Carolina drug tax, the lower court correctly concluded it was a criminal penalty rather than a civil remedy. Under those circumstances, it did not constitute a "tax under State law." This determination is consistent with earlier decisions of this Court holding that a statutory prohibition against a court restraining the collection of any tax does not apply to a tax that actually operates as a criminal penalty. *See Lipke v. Lederer,* 259 U.S. 557, 561-62 (1922); *accord Regal Drug Corporation v. Wardell,* 260 U.S. 386, 392 (1922). This analysis, consistent with earlier decisions of this Court, does not present a significant constitutional issue worthy of certiorari review.

I.

THE COURT OF APPEALS CORRECTLY INTERPRETED AND APPLIED *KURTH RANCH* AND *HUDSON* TO HOLD THAT NORTH CAROLINA'S DRUG TAX LAW IS A CRIMINAL PENALTY.

A. The Court Of Appeals' Opinion Interprets *Kurth Ranch* And *Hudson* Consistent With Other Decisions Of This Court And Is Consistent With The Notion That Penalties Which Are Civil In Name Only Do Not Lose Their Punitive Character With The Attachment Of A Civil Label.

The court of appeals correctly interpreted and applied this Court's decision in *Kurth Ranch* and *Hudson* to hold that North Carolina's excise tax on the possession of specified quantities

of illegal drugs is a criminal penalty, which requires the State to provide all the protections constitutionally mandated for criminal prosecutions. The primary failing in petitioners' request for certiorari review hinges on its misunderstanding of *Hudson* vis-a-vis *Kurth Ranch*. This Court explicitly accepted certiorari in *Hudson* to answer whether an in personam civil penalty constituted punishment for the purpose of the constitutional protection against double jeopardy. In doing so, *Hudson* clarified the appropriate test for determining when civil remedy crosses the line into a criminal penalty for constitutional purposes. *Hudson* "disavowed" the approach in *Halper*. In reaching this conclusion, *Hudson* recognized several recent cases had taken different approaches in resolving the same issue. Specifically, it noted *Kurth Ranch* did not follow the now-defunct *Halper* analysis. Rather, *Kurth Ranch* followed the approach outlined in *Mendoza-Martinez* that *Hudson* endorsed. *Hudson* 139 L. Ed. 2d at 461 n.6. If a court uses the *Kurth Ranch* analysis, it is acting consistently with *Hudson*.

The Fourth Circuit below followed the approach in *Kurth Ranch*. Indeed, it relied primarily on *Kurth Ranch* in its extensive analysis. *Lynn*, 134 F.3d 582. The court below studiously and painstakingly analyzed the substantive effect of the North Carolina drug tax as required by *Kurth Ranch*. Petitioners claim the lower court focused on the limited feature of deterrence in *Kurth Ranch* to the exclusion of all other factors. Nothing could be more inaccurate. The lower court carefully studied the North Carolina drug tax along each of the four factors in *Kurth Ranch*: whether the tax was imposed at a high rate, whether the tax had deterrent purposes, whether the tax was conditioned on commission of a crime, and whether the tax had no relationship to a lawful purpose. *Lynn*, 134 F.3d 582. The lower court correctly concluded that the North Carolina drug tax failed each of the four factors. That this alleged tax failed each of the four factors outlined in *Kurth Ranch*, then, demonstrated that

respondent showed by the "clearest proof," *Hudson*, 139 L. Ed. 2d at 459 (*quoting United States v. Ward*, 448 U.S. 242, 249 (1980), the criminal nature of the so-called tax.

The state attempts to distinguish its "tax" from Montana's by saying that the citizen can't be taxed if he doesn't own or possess the taxed substance. It is difficult to imagine a situation where the state would find a citizen to possess or own a controlled substance without being caught with the substance and having the substance confiscated.

The court of appeals required Fifth and Sixth Amendment protections because it determined a criminal penalty was being imposed on the affected citizen.

A careful reading of the opinion below, a reading not taken by petitioners, shows the Fourth Circuit essentially followed all of the guideposts articulated in *Mendoza-Martinez* and adopted in *Hudson*. These seven points include (1) does the sanction involve an affirmative disability or restraint; (2) has the sanction historically been regarded as punishment; (3) does the sanction come into play only on a finding of *scienter*; (4) does the sanction promote the traditional aims of punishment, i.e. retribution and deterrence; (5) does the sanction apply to behavior that is already a crime; (6) is there an alternative purpose for the remedy that can rationally be connected to it; and (7) does the sanction appear excessive in relation to this alternative purpose? *Hudson*, 139 L. Ed. 2d at 459 (quoting *Mendoza-Martinez*, 372 U.S. at 168-69.) The lower court explained its results in terms of the four factors in *Kurth Ranch*. Even a cursory examination of these four factors reveals, however, that they embodied most, if not all, of the seven factors in *Mendoza-Martinez*.

The first *Kurth Ranch* factor is the high rate of taxation. It goes to both the second and seventh factors in *Mendoza-*

Martinez. A high rate of taxation indicates its punitive character as a high fine has historically been viewed as punishment. It also shows its excessive nature when viewed against an alternative purpose other than punishment for it. The lower court also recognized that North Carolina has been the most aggressive of all the states in pursuing a tax on controlled substances. Indeed, the lower court found the tax imposed in North Carolina is excessively high and disproportionate.

The second *Kurth Ranch* factor involved the deterrent purpose of the civil remedy. The fourth factor in *Merdoza-Martinez* is the deterrent purpose of the allegedly civil remedy. As the lower court correctly found, the high amount of tax imposed reflected a legislative intent to deter possession of these illegal drugs.

The third factor in *Kurth Ranch* applied by the court below is whether the civil remedy is conditioned on a commission of a crime. This factor encompasses both the third and fifth guideposts in *Mendoza-Martinez*. The third factor was whether the tax required *scienter. Scienter* is essentially criminal intent or the existence of a guilty mind. W. LaFave & A. Scott, Criminal Law 212 (2d ed. 1986). Obviously, a tax or civil remedy imposed for possessing illegal narcotics requires some criminal intent or a guilty mind. Likewise, the fifth factor in *Mendoza-Martinez* is whether the tax is imposed on criminal conduct. In North Carolina, one cannot possess illegal narcotics without committing a crime. There can be no lawful possession of the controlled substances seized and taxed in this case. The tax is inextricably connected to criminal conduct.

The fourth factor in *Kurth Ranch* is whether the tax bears no relationship to a lawful purpose or possession. *Kurth Ranch* explained this question asks if the payment of a tax allows the taxpayer to legally or lawfully possess the taxed substance. As

explained above, payment of the North Carolina drug tax creates no lawful possession of the taxed substances. Thus, payment of the tax bears no relationship to a lawful purpose. This factor encompasses the sixth criterion in *Mendoza-Martinez* — whether an alternative purpose may be rationally assigned to the tax.

As this analysis reveals, a fair reading of the opinion below demonstrates it complied with virtually all of the criteria articulated in *Mendoza-Martinez* and endorsed by *Hudson*. The only standard arguably omitted is whether the civil remedy created an affirmative disability or restraint. This civil remedy essentially operates as an affirmative disability or restraint given the extremely high rate of taxation in this case, North Carolina's very aggressive pursuit of this tax, and the criminal conduct necessarily required for a person to owe the tax. Only actual incarceration could cause a greater disability or restraint. Under these circumstances, it is beyond peradventure that the lower court correctly determined the challenged tax constitutes a criminal penalty or punishment under the *Mendoza-Martinez* criteria. Hence, it followed *Hudson*.

In the present case the tax imposed, in excess of $390,000 exceeds the value of the substance on the "black market", about $30,000, or twelve times its "black market" value. The state characterizes the tax as deterrence (and erroneously says the Fourth Circuit analyzed the tax only on this basis) or retributive while its realistic effect is the economic evisceration of a citizen. The only citizens in the Respondent's position who would not lose every item of value that they had plus what they would have for their life or the greater portion of it is those who would have a net worth in excess of $390,000. In this connection, the maximum fine for conviction of the criminal offense of Possession of a Controlled Substance with the Intent to Sell and Deliver (cocaine) carries a maximum fine of $250,000 or $140,000 less than the "tax" imposed on the Respondent in

this case. *See* N.C.G.S. § 90-95(h)(3)c at page 10a of appendix. The state's argument that there is no clear proof to convert this "tax" into a penalty is patently absurd when the maximum fine under the parallel criminal statute carries a smaller penalty than the state's alleged civil "tax".

II.

THE COURT OF APPEALS CORRECTLY ASSUMED JURISDICTION IN KEEPING THE TAX INJUNCTION ACT, 28 U.S.C. § 1341, AND NUMEROUS DECISIONS OF THIS COURT.

A. The North Carolina Controlled Substance Tax Does Not Provide A "Plain, Speedy And Efficient" Remedy For The Citizen.

Petitioner argues that the court of appeals should not have entertained jurisdiction in contravention of the Tax Injunction Act, 28 U.S.C. § 1341. Explicit in their argument is that the North Carolina procedure provides a "plain, speedy and efficient" remedy to the taxpayer to redress his grievances. This issue was reserved by the Court of Appeals and not discussed because they concluded that the "tax" was a penalty.[2]

It is a "plain, speedy and efficient" remedy only if you consider a remedy efficient where the claimant cannot complain of unconstitutional practices. In North Carolina the administrative review does not allow for the raising of constitutional objections and the Respondent was not allowed to do so in this case. *See Great American Insurance Co. v. Gold*, 254 N.C. 719, 144 S.E. 2d 904 (1965).

2. An additional issue as to whether the taxing structure as applied constituted an unconstitutional Bill of Attainder was also reserved by the Court in view of the penalty finding.

Only after complete payment of the tax or posting of a bond equal to the amount of the tax can the citizen obtain review in a judicial proceeding and raise his constitutional objections. *See* N.C.G.S. § 105-241.4.

The decision of the court of appeals to assume jurisdiction on the grounds that the "tax" was really a criminal penalty was warranted by the facts in this case. The Holding of the court of appeals does not affect the amount of the tax or the ability of the Petitioner to collect it. It only requires that the state give the citizen the right to have the issue of the tax determined by a Judge and Jury. If the drug tax is useless it can only be because the Petitioner does not believe it will be able to collect any of the tax if it affords the citizen some measure of legitimate due process.[3]

B. The North Carolina Tax Is Not A Tax But A Penalty.

The North Carolina "tax" is not a tax but a penalty for the following reasons: (1) the amount of the tax exceeds the maximum amount of criminal fine that can be imposed for the same conduct; (2) the tax imposed does not take into account the ability of the citizen to pay; and (3) it crosses the boundary for excessive fines.

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3. The undercurrent in this case is a political issue which the Petitioner has carefully sought to avoid. Under the North Carolina Constitution if the state collects a fine or forfeiture the proceeds go to the public schools. The police however, were taking seized property to the federal authorities even when not lawfully entitled to do so because the federal authorities would give the police a portion of the seized assets. Rather than use the traditional methods of seizing drug assets like those of the federal government, the state must find a away around their constitution. For an explanation of the situation *see United States v. Winston-Salem/Forsyth County Board of Education*, 902 F.2d 267 (4th Cir. 1990). So in order for the state to get any drug proceeds they had to find a way to pay off the police.

Unlike a criminal fine that requires an analysis by the trial court of the ability of the wrongdoer to pay the "tax" requires no such analysis and exceeds the maximum amount of a criminal fine.

It has been recognized in the jurisprudence of this country since the beginning that "the power to tax is the power to destroy." *McCulloch v. Maryland*, 17 U.S. 316 (1819).

Fines or civil punishments that are out of proportion to the wrong sought to be redressed are to be viewed with suspicion and even struck down if the amount of the penalty is grossly disproportional to the gravity of the defendant's offense. *See United States v. Bajakajian*, __ U.S. __ (Case No. 96-1487, decided June 22, 1998):

> Similarly, Magna Charta—which the Stuart judges were accused of subverting—required only that amercements (the medieval predecessors of fines) should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood:
>
> A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement; (2) and a Merchant likewise, saving to him his merchandise; (3) and any other's villain than ours shall be likewise amerced, saving his wainage.
>
> Magna Charta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 6-7 (1762 ed.).

As *Bajakajian* outlines clearly shows, the original intent of the excessive fines clause was to prevent impoverishment for the

sake of punishment. Certainly if a criminal fine is deemed excessive if it deprives the wrongdoer of his right to economically exist the excessiveness of that fine does not become palatable because it is labeled a tax.

CONCLUSION

This case does not merit further review by this Court. For the foregoing reasons North Carolina's petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — RELEVANT STATUTES

WEST'S NORTH CAROLINA STATUTES
CHAPTER 90. MEDICINE AND ALLIED OCCUPATIONS
ARTICLE 5. NORTH CAROLINA CONTROLLED SUBSTANCES ACT

Sec. 90-95. Violations; penalties

Text of section effective January 1, 1995

(a) Except as authorized by this Article, it is unlawful for any person:

(1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;

(2) To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance;

(3) To possess a controlled substance.

(b) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(1) with respect to:

(1) A controlled substance classified in Schedule I or II shall be punished as a Class H felon;

(2) A controlled substance classified in Schedule III, IV, V, or VI shall be punished as a Class I felon, but the transfer of less than 5 grams of marijuana for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1).

(c) Any person who violates G.S. 90-95(a)(2) shall be punished as a Class I felon.

Appendix A

(d) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(3) with respect to:

(1) A controlled substance classified in Schedule I shall be punished as a Class I felon;

(2) A controlled substance classified in Schedule II, III, or IV shall be guilty of a Class 1 misdemeanor. If the controlled substance exceeds four tablets, capsules, or other dosage units or equivalent quantity of hydromorphone or if the quantity of the controlled substance, or combination of the controlled substances, exceeds one hundred tablets, capsules or other dosage units, or equivalent quantity, the violation shall be punishable as a Class I felony. If the controlled substance is one gram or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, or any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocanized coca leaves or any extraction of coca leaves which does not contain cocaine or ecgonine), the violation shall be punishable as a Class I felony. If the controlled substance is phencyclidine, the violation shall be punishable as a Class I felony.

(3) A controlled substance classified in Schedule V shall be guilty of a Class 2 misdemeanor;

(4) A controlled substance classified in Schedule VI shall be guilty of a Class 3 misdemeanor, but any sentence of imprisonment imposed must be suspended and the judge may

not require at the time of sentencing that the defendant serve a period of imprisonment as a special condition of probation. If the quantity of the controlled substance exceeds one-half of an ounce (avoirdupois) of marijuana or one-twentieth of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, the violation shall be punishable as a Class 1 misdemeanor. If the quantity of the controlled substance exceeds one and one-half ounces (avoirdupois) of marijuana or three-twentieths of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, or if the controlled substance consists of any quantity of synthetic tetrahydrocannabinols or tetrahydrocannabinols isolated from the resin of marijuana, the violation shall be punishable as a Class I felony.

(d1) Except as authorized by this Article, it is unlawful for any person to:

(1) Possess an immediate precursor chemical with intent to manufacture a controlled substance; or

(2) Possess or distribute an immediate precursor chemical knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture a controlled substance.

Any person who violates this subsection shall be punished as a Class H felon.

(d2) The immediate precursor chemicals to which subsection (d1) of this section applies are those immediate precursor chemicals designated by the Commission pursuant to its authority under G.S. 90-88, and the following (until otherwise specified by the Commission):

Appendix A

(1) Anthranilic acid.
(2) Benzyl cyanide.
(3) Chloroephedrine.
(4) Chloropseudoephedrine.
(5) D-lysergic acid.
(6) Ephedrine.
(7) Ergonovine maleate.
(8) Ergotamine tartrate.
(9) Ethyl Malonate.
(10) Ethylamine.
(11) Isosafrole.
(12) Malonic acid.
(13) Methylamine.
(14) N-acetylanthranilic acid.
(15) N-ethylephedrine.
(16) N-ethylpseudoephedrine.
(17) N-methylephedrine.
(18) N-methylpseudoephedrine.
(19) Norpseudoephedrine.
(20) Phenyl-2-propane.
(21) Phenylacetic acid.
(22) Phenylpropanolamine.
(23) Piperidine.
(24) Piperonal.
(25) Propionic anhydride.
(26) Pseudoephedrine.
(27) Pyrrolidine.
(28) Safrole.
(29) Thionylchloride.

(e) The prescribed punishment and degree of any offense under this Article shall be subject to the following conditions, but the punishment for an offense may be increased only by

the maximum authorized under any one of the applicable conditions:

(1), (2) Repealed by Laws 1979, c. 760, Sec. 5.

(3) If any person commits a Class 1 misdemeanor under this Article and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be punished as a Class I felon. The prior conviction used to raise the current offense to a Class I felony shall not be used to calculate the prior record level;

(4) If any person commits a Class 2 misdemeanor, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be guilty of a Class 1 misdemeanor. The prior conviction used to raise the current offense to a Class 1 misdemeanor shall not be used to calculate the prior conviction level;

(5) Any person 18 years of age or over who violates G.S. 90-95(a)(1) by selling or delivering a controlled substance to a person under 16 years of age or a pregnant female shall be punished as a Class E felon. Mistake of age is not a defense to a prosecution under this section. It shall not be a defense that the defendant did not know that the recipient was pregnant;

(6) For the purpose of increasing punishment under G.S. 90-95(e)(3) and (e)(4), previous convictions for offenses shall be counted by the number of separate trials at which final

convictions were obtained and not by the number of charges at a single trial;

(7) If any person commits an offense under this Article for which the prescribed punishment requires that any sentence of imprisonment be suspended, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be guilty of a Class 2 misdemeanor;

(8) Any person 21 years of age or older who commits an offense under G.S. 90-95(a)(1) on property used for an elementary or secondary school or within 300 feet of the boundary of real property used for an elementary or secondary school shall be punished as a Class E felon. For purposes of this subdivision, the transfer of less than five grams of marijuana for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1).

(9) Any person who violates G.S. 90-95(a)(3) on the premises of a penal institution or local confinement facility shall be guilty of a Class I felony.

(f) Any person convicted of an offense or offenses under this Article who is sentenced to an active term of imprisonment that is less than the maximum active term that could have been imposed may, in addition, be sentenced to a term of special probation. Except as indicated in this subsection, the administration of special probation shall be the same as probation. The conditions of special probation shall be fixed in the same manner as probation, and the conditions may include requirements for rehabilitation treatment. Special probation shall

follow the active sentence. No term of special probation shall exceed five years. Special probation may be revoked in the same manner as probation; upon revocation, the original term of imprisonment may be increased by no more than the difference between the active term of imprisonment actually served and the maximum active term that could have been imposed at trial for the offense or offenses for which the person was convicted, and the resulting term of imprisonment need not be diminished by the time spent on special probation.

(g) Whenever matter is submitted to the North Carolina State Bureau of Investigation Laboratory, the Charlotte, North Carolina, Police Department Laboratory or to the Toxicology Laboratory, Reynolds Health Center, Winston-Salem for chemical analysis to determine if the matter is or contains a controlled substance, the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis shall be admissible without further authentication in all proceedings in the district court division of the General Court of Justice as evidence of the identity, nature, and quantity of the matter analyzed.

(h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article.

(1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 50 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved:

a. Is in excess of 50 pounds, but less than 100 pounds, such person shall be punished as a Class H felon and shall be

sentenced to a minimum term of 25 months and a maximum term of 30 months in the State's prison and shall be fined not less than five thousand dollars ($5,000);

b. Is 100 pounds or more, but less than 2,000 pounds, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

c. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

d. Is 10,000 pounds or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(2) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or the equivalent quantity, or more of methaqualone, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in methaqualone" and if the quantity of such substance or mixture involved:

a. Is 1,000 or more dosage units, or equivalent quantity, but less than 5,000 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months

in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 10,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or any coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, and any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocanized coca leaves or any extraction of coca leaves which does not contain cocaine) or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

(3a) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or the equivalent quantity, or more of amphetamine, its salts, optical isomers, and salts of its optical isomers or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in amphetamine" and if the quantity of such substance or mixture involved:

a. Is 1,000 or more dosage units, or equivalent quantity, but less than 5,000 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 10,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(3b) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine shall be guilty of a felony which felony shall be known as "trafficking in methamphetamine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

(4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate

(except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved:

a. Is four grams or more, but less than 14 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of 120 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of 279 months in the State's prison and shall be fined not less than five hundred thousand dollars ($500,000).

(4a) Any person who sells, manufactures, delivers, transports, or possesses 100 tablets, capsules, or other dosage units, or the equivalent quantity, or more, of Lysergic Acid Diethylamide, or any mixture containing such substance, shall be guilty of a felony, which felony shall be known as "trafficking in Lysergic Acid Diethylamide". If the quantity of such substance or mixture involved:

a. Is 100 or more dosage units, or equivalent quantity, but less than 500 dosage units, or equivalent quantity, such person shall

be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 500 or more dosage units, or equivalent quantity, but less than 1,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 1,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(5) Except as provided in this subdivision, a person being sentenced under this subsection may not receive a suspended sentence or be placed on probation. The sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

(6) Sentences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder.

(i) The penalties provided in subsection (h) of this section shall also apply to any person who is convicted of conspiracy to commit any of the offenses described in subsection (h) of this section.

Amended by Laws 1993, c. 538, Sec. 30, eff. Jan. 1, 1995; Laws 1993, c. 539, Sec. 1358.1, eff. Jan. 1, 1995.

For text of section effective until January 1, 1995, see Sec. 90-95, ante.

HISTORICAL NOTES

HISTORICAL AND STATUTORY NOTES

Laws 1993, c. 538, Sec. 56, provides:

"This act becomes effective January 1, 1995, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Laws 1993, c. 538, was ratified July 24, 1993.

Laws 1993, c. 539, Sec. 1359, provides:

"This act becomes effective January 1, 1995, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not

abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Laws 1993, c. 539, was ratified July 24, 1993.

Supreme Court, U.S.
FILED
SEP 22 1998
OFFICE OF THE CLERK

No. 97-1829

In the
Supreme Court of the United States
October Term, 1997

Deborah West, in her individual capacity and official capacity as an agent of the State of North Carolina; Janice Faulkner, Secretary of Revenue, State of North Carolina, in her official capacity; State of North Carolina,

Petitioners,

v.

David L. Lynn, Jr.; Robin Dixon Lynn; Rodney Lynn; Roxanne Lynn; David L. Lynn, Sr.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

MICHAEL F. EASLEY
North Carolina Attorney General

Hampton Y. Dellinger
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North Carolina Department of Justice
Post Office Box 629
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In the
Supreme Court of the United States
October Term, 1997

No. 97-1829

Deborah West, in her individual capacity and official capacity as an agent of the State of North Carolina; Janice Faulkner, Secretary of Revenue, State of North Carolina, in her official capacity; State of North Carolina,

Petitioners,

v.

David L. Lynn, Jr.; Robin Dixon Lynn; Rodney Lynn; Roxanne Lynn; David L. Lynn, Sr.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

ADDITIONAL REASONS FOR GRANTING PETITION

In their petition for writ of certiorari, petitioners urged the Court to issue its writ of certiorari because the United States Court of Appeals for the Fourth Circuit erroneously held in *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998), that the provisions of North Carolina's "drug tax," N.C. GEN. STAT. § 105-113.105 through § 105-113.113, constituted a criminal penalty. Among the myriad problems and concerns facing North

Carolina as a result of *Lynn* was the conflict between that decision and two decisions of the North Carolina appellate courts holding that the "drug tax" is not a criminal penalty. *State v. Ballenger*, 472 S.E.2d 572 (N.C. Ct. App. 1996), *aff'd per curiam*, 481 S.E.2d 84 (N.C.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 68 (1997); *State v. Creason*, 473 S.E.2d 771, 772 (N.C. Ct. App. 1996), *aff'd per curiam*, 484 S.E.2d 525 (N.C. 1997). That conflict raises a formidable threat to the convictions of drug offenders and the ongoing and future prosecutions of other drug offenders who had been assessed taxes pursuant to N.C. GEN. STAT. §§ 105-113.105 *et seq.*:

> Although North Carolina is not now collecting additional drug tax money, in deference to the court of appeals' opinion, numerous criminal cases inevitably exist in which defendants have not exhausted their appeals or may still petition for habeas corpus relief, asserting double jeopardy claims on the theory that payment of the drug tax precluded their subsequent criminal convictions for drug offenses.

Petition, p. 18. The threat to those prosecutions has now become painfully real, and North Carolina's need for resolution of these conflicting decisions has now become acute.

North Carolina now faces challenges to criminal convictions and sentences from drug offenders who were assessed "drug taxes" prior to their convictions, but more significantly it is fighting challenges to its ability to prosecute accused drug offenders who claim that they are immune from

prosecution on double jeopardy grounds because of earlier drug tax assessments. On September 4, 1998, the United States District Court for the Western District of North Carolina issued a preliminary injunction ordering the State District Attorney for North Carolina Prosecutorial District 20-B not to prosecute a state court defendant on four charges of trafficking in cocaine. *Morrison v. State of North Carolina, et al.*, No. 3:98-CV-370-MU (W.D.N.C. September 4, 1998) (order granting preliminary injunction), App. 13a-15a. The court did so on plaintiff Morrison's claim, brought under 42 U.S.C. § 1983, that his right to be free of Double Jeopardy would be violated by the prosecutions because he had been assessed excise taxes on possession of the same drugs. *See* Complaint, App. 1a-8a. The injunction extended only to four of five pending prosecutions because no assessment had in fact been made as to the drugs at issue in the fifth prosecution. Nevertheless, four drug trafficking prosecutions involving 390.8 grams of cocaine have been enjoined because of a single assessment resulting in collection of only $315. *See* App. 4a, 10a. Thus, in the view of the United States District Court for the Western District of North Carolina, a state court defendant who has never been subjected to a criminal prosecution and from whom only a nominal amount has been collected is protected from prosecution for four separate drug trafficking charges,.

The confusion and uncertainty surrounding prosecution of drug offenses in North Carolina has been enhanced by the result in yet another recent challenge to the State's ability to prosecute an accused on drug trafficking charges. In the Middle District of North Carolina, a petition for habeas corpus was

filed by an accused seeking to halt prosecution on three drug trafficking charges on the grounds that he previously had been subjected to punishment in the form of the drug tax assessment. In that case, however, the magistrate judge initially hearing the request for a stay of the criminal prosecution recommended denial of the stay and dismissal of the proceeding. *McAdams v. Hardin*, No. 1:98CV786 (M.D.N.C. September 14, 1998) (recommendation of United States Magistrate Judge for denial of stay and dismissal), App. 17a-31a.

In the two federal cases, *Morrison* and *McAdams*, the State contended that the district court should abstain on the basis that federal courts should rarely, and only under extraordinary circumstances, enjoin pending state criminal prosecutions. *Younger v. Harris*, 401 U.S. 37 (1971). These cases do not present such extraordinary circumstances even though they raise double jeopardy claims because in neither instance has the state court defendant been previously subjected to a trial or actual prosecution. In each case, his only double jeopardy claim stems from a non-judicial assessment and the collection of a relatively small amount of money. Since their only double jeopardy claims are ones of potential multiple punishment, neither state court defendant faced the irreparable harm of multiple trials that would override the *Younger* abstention rule or that would constitute irreparable harm for purposes of a stay or preliminary injunctive relief. *See Abney v. United States*, 431 U.S. 651, 660 (1977) ("[t]o be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final

judgment."). Evidently, the same argument prevailed to allow prosecution in *McAdams*, but was rejected in *Morrison* so that his prosecution on four discrete drug trafficking charges has been enjoined.

In addition to serving as the basis for conflicting federal district court rulings, *Lynn* has generated several recent attacks on the "drug tax" in North Carolina state courts. Criminal defendants are attempting to stop drug trafficking prosecutions by moving to dismiss indictments filed in the trial courts, and appeals from trial court rulings are pending in the state appellate courts, with more anticipated. On another front, *Lynn* has also spawned a civil class action seeking refunds of taxes already assessed and collected. *Milligan v. State of North Carolina*, 98 CVS 07891, Superior Court of Wake County, North Carolina. In each instance, *Lynn* is being used as a lever in litigants' attempts to overturn established rulings of North Carolina's appellate courts, rulings that were left undisturbed by this Court, upholding the "drug tax."

If this Court does not issue its writ of certiorari, North Carolina's state and federal courts will be repeatedly confronted with the untenable situation of two contradictory rulings by independent and co-equal judicial sovereigns on the same point of law. Moreover, as the *Morrison* and *McAdams* decisions highlight, North Carolina's ability to prosecute drug trafficking charges is threatened by the uncertainty surrounding the nature of its drug tax statutes -- whether they do indeed impose a criminal penalty, as the court of appeals held in *Lynn*, or whether they do not impose a criminal penalty, as the state

courts have held in *Ballenger* and *Creason*. Until this uncertainty is cleared up, North Carolina may be thwarted in its ability to prosecute perhaps hundreds of accused drug traffickers or be put to the test to fight them in federal court as to whether their state court prosecutions should be enjoined. The ability of the State effectively to combat drug trafficking will be severely hampered if hundreds of accused drug traffickers cannot be prosecuted.

CONCLUSION

For the reasons set out initially in the Petition for Writ of Certiorari and supplemented in this Supplemental Brief, petitioners urge this Court to issue its writ of certiorari in order to (1) resolve the conflict between the rulings of the state and federal courts, (2) hold that North Carolina's drug tax is not a criminal penalty such that it bars subsequent criminal prosecutions, and (3) permit North Carolina and similarly-situated states to prosecute accused drug traffickers.

Respectfully submitted,

MICHAEL F. EASLEY
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September 22, 1998

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COMPLAINT, *MORRISON V. STATE OF NORTH CAROLINA*, AUGUST 24, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

NO. 3:98-CV-370-MU

DANIEL ARTHUR MORRISON,)
)
Plaintiff,)
)
v.)
)
STATE OF NORTH CAROLINA, and the)
Honorable Kenneth W. Honeycutt, in his)
official capacity as District Attorney for)
the 20-B Prosecutorial District,)
)
Defendants.)

COMPLAINT

PRELIMINARY STATEMENT

1. This is a civil rights action in which Plaintiff Daniel Arthur Morrison seeks to have this Court declare unlawful a criminal trial on indictments which allege conduct for which the State of North Carolina has already exacted

criminal penalties through enforcement of a drug tax assessment.

2. This action arises under 42 U.S.C. § 1983; the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202; and the Fifth and Fourteenth Amendments to the United States Constitution.

3. Jurisdiction is conferred on this Court by 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1343 (a)(3) (civil rights).

PARTIES

4. Plaintiff Daniel Arthur Morrison is a citizen of Union County, North Carolina.

5. The Superior Court of Union County is an agency of the State of North Carolina existing pursuant to Article IV § 16 of the Constitution of North Carolina, and N.C. Gen. Stat. Chapter 7-A, and is charged with the conduct of civil and criminal trials and the general administration of justice in Union County.

6. The Honorable Sanford L. Steelman, Jr., is a resident Superior Court Judge in Union County, North Carolina, elected to that office pursuant to Article IV § 16 of the Constitution of North Carolina and N.C. Gen. Stat. Chapter 7-A. Judge Steelman presided over pre-trial matters in the

***MORRISON* COMPLAINT, CONTINUED . . .**

prosecution of Plaintiff Morrison on the indictments alleging trafficking in cocaine and, in an Order and Memorandum of Decision filed on August 5, 1998, denied Plaintiff Morrison's motion to dismiss.

7. The Honorable Kenneth W. Honeycutt is the District Attorney for the 20-B Prosecutorial District including Union County, North Carolina, and was elected to that position pursuant to Article IV § 18 of the Constitution of North Carolina, and N.C. Gen. Stat. Chapter 7-A. Mr. Honeycutt is responsible for the prosecution of violations of the state criminal laws in Union County. Mr. Honeycutt personally and/or through his assigned assistant district attorneys obtained the indictments against Mr. Morrison and calendered those matters for trial in the Union County Superior Court.

8. Each of the defendants in this action is sued only in their official capacity.

STATEMENT OF THE CLAIM

9. At all times relevant herein, defendants acted and continued to act in their official capacity and under color of state law.

10. On January 27 and on February 12, 1997 plaintiff was arrested and charged respectively with one count (97 CRS 1174) and four counts (97 CRS 1619-1622) of

MORRISON COMPLAINT, CONTINUED . . .

Trafficking in Cocaine. All charges were filed in the Union County Superior Court.

11. On May 8, 1997, the plaintiff was assessed with tax, penalty and interest under the provisions of N.C.G.S. § 105-113.111 in the amount of $119,579.60. Cash in the amount of $315 seized from the plaintiff was applied towards the tax, and a lien was filed in the Office of the Clerk of Court for Union County in Judgment Docket 54 at Page 289.

12. On January 13, 1998 the Fourth Circuit Court of Appeals held that the tax assessments rendered pursuant to N.C.G.S. § 105 constituted a criminal penalty, *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998). The *Lynn* Court relied upon the analysis of the United States Supreme Court in the case of *Department Of Revenue v. Kurth Ranch*, 511 U.S. 767, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994).

13. On January 22, 1998 Plaintiff Morrison filed a Motion to Dismiss the criminal charges pending against him in the Superior Court based on double jeopardy, citing the decision in *Lynn*. *See* Exhibit 1, attached. On August 5, 1998, the Superior Court, the Honorable Sanford L. Steelman, Jr., presiding, filed and *Order and Memorandum of Decision* denying plaintiff's motion. *See* Exhibit 2, attached.

MORRISON COMPLAINT, CONTINUED . . .

14. Plaintiff's trial is pending in the above-referenced matters at the 17 August 1998 Criminal Session of the Union County Superior Court.

15. By seizing more than three hundred dollars in cash, pursuant to the Drug Tax Assessment provisions of N.C.G.S. § 105 and securing a lien for more than $100,000, and having that judgment entered by the clerk of court, the State of North Carolina has already subjected plaintiff to a criminal penalty. The State is therefore barred by the fifth and fourteenth amendments to the United States Constitution from subjecting him to a criminal trial for the same conduct.

16. In *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998), the Fourth Circuit Court of Appeals reviewed a constitutional challenge raised against the Controlled Substance Tax (Drug Tax), N.C.G.S. §§ 105-113.105 through 105-113.113. The *Lynn* Court held that "the Drug Tax is in reality a criminal penalty under *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994). Indeed, in a comprehensive analysis of the Drug Tax, the panel in *Lynn* unanimously concluded that the legislation shared each of the four features found by the *Kurth Ranch Court* to be indicative of a criminal penalty.

17. The Superior Court acknowledges that the Fourth Circuit Court of Appeals decision in *Lynn* compels the conclusion that a trial of Mr. Morrison on these indictments

would subject him to double jeopardy. *Order* at ¶¶ 6-11, attached as Exhibit 2. The Superior Court concluded, however, that based on a *per curiam*, pre-*Lynn* decision by the North Carolina Supreme Court, it was bound to deny defendant's motion to dismiss. *Id.*

18. On August 17, 1998, the plaintiff filed a Notice of Appeal to the North Carolina Court of Appeals with the Clerk for the Union County Superior Court. *See Notice of Appeal*, attached as Exhibit 3.

19. On August 17, 1998 the North Carolina Court of Appeals denied plaintiff's motion to stay the trial pending resolution of the appeal in this matter. *See Order* attached as Exhibit 4. Plaintiff remains on the trial calendar for the present criminal session of the Union County Superior Court.

20. If defendants are not enjoined from subjected plaintiff to a criminal trial at the current session of the Union County Superior Court, on indictments which allege conduct for which the State of North Carolina has already imposed criminal penalties, defendants will subject plaintiff to an irreparable deprivation of his right to be free from double jeopardy as secured by the fifth and fourteenth amendments to the United States Constitution.

22. If defendants are not enjoined from subjecting plaintiff to a criminal trial, under circumstances which the

MORRISON COMPLAINT, CONTINUED . . .

Fourth Circuit Court of Appeals has expressly determined to violate the constitutional prohibition against double jeopardy, because the defendants choose to follow contrary state court interpretations of the federal constitution, plaintiff will be deprived of his constitutional rights under the fifth and fourteenth amendments to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully request that this Court:

1. Assume jurisdiction of this matter;

2. Enter a declaratory judgment declaring that for the State of North Carolina to subject plaintiff to a criminal trial, after the state assessed a criminal penalty against plaintiff pursuant to the "drug tax," would unconstitutionally violate plaintiff's right to be free from double jeopardy;

3. Enter an injunction restraining defendants from subjecting plaintiff to a trial on the above-referenced indictments; and

4. Enter such other and further relief as the Court deems just and proper.

MORRISON COMPLAINT, CONTINUED . . .

Respectfully submitted,

This the 24th ay of August, 1998.

/s/ Henderson Hill
FERGUSON, STEIN, WALLAS, ADKINS,
GRESHAM & SUMTER, P.A.
741 Kenilworth Avenue, Suite 300
Charlotte, North Carolina 28204
(704) 375-8461
N.C. Bar No. 18563

[Exhibits and Certificate of Service Omitted in Printing]

IMPORTANT
Action Must Be Taken
IMMEDIATELY

State of North Carolina
DEPARTMENT OF REVENUE
P.O. BOX 25000
Raleigh, N.C. 27640

Form BD-10
BD

AN: 412142

NOTICE OF CONTROLLED SUBSTANCE TAX ASSESSMENT

DANIEL AURTHUR MORRISON
121 EAST AVE.
MONROE, NC 28110

January 30, 1997
DAN-AU-MORR
Union

YOU ARE HEREBY NOTIFIED that an assessment of controlled substance tax plus interest and any applicable penalty is proposed against you as follows:

TAX	PENALTY	INTEREST*	TOTAL
$78,200.00	$39,100.00	$586.50	$117,886.50

Substances included in this tax assessment are:	Taxable Quantity	Tax Rate	Tax Amount
390.80 grams Crack Cocaine	391.00	200.00	78,200.00

*INTEREST ACCRUES ON ALL UNPAID TAXES FROM JANUARY 27, 1997 TO THE DATE OF PAYMENT.

This assessment is proposed pursuant to G.S. 105-113.111 (See attached copy). If you desire a hearing before the Secretary of Revenue with respect to this proposed assessment, you must submit a written request for hearing within thirty days after the date of this notice, as provided by G.S. 105-241.1. Your request should set forth in detail your objection to the assessment and must be timely served upon the Secretary of Revenue addressed to Controlled Substance Tax Division. Unless your application for hearing is filed within the time stated, this proposed assessment will become final and conclusive without further notice.

In the event you fail to respond immediately to this proposed assessment by remitting the full amount shown due or by posting a bond, collection may proceed pursuant to G.S. 105-241.1(g) or G.S. 105-242 without regard to whether you have requested a hearing.

NOTICE OF TAX ASSESSMENT, CONTINUED . . .

/s/ Muriel K. Offerman
SECRETARY OF REVENUE

By: FRED H. GREGORY
ENFORCEMENT OFFICER

To insure proper credit, please attach your payment to the copy of this notice.

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ORDER - PRELIMINARY INJUNCTION IN *MORRISON V. STATE OF NORTH CAROLINA*, SEPTEMBER 4, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

NO. 3:98-CV-370-MU

DANIEL ARTHUR MORRISON,	)
	)
Plaintiff,	)
	)
v.	)
	)
STATE OF NORTH CAROLINA, and the Honorable Kenneth W. Honeycutt, in his official capacity as District Attorney for the 20-B Prosecutorial District,	)
	)
Defendants.	)

ORDER

PRELIMINARY INJUNCTION

THIS MATTER is before the Court upon Plaintiff's motion for a preliminary injunction (document number 5). A hearing on this matter was held on September 4, 1998.

***MORRISON*, PRELIMINARY INJUNCTION, CONTINUED . . .**

For reasons articulated at the hearing in open court, this Court adopts the findings made during the hearing on the motion for a temporary restraining order held August 26, 1998.

It is therefore ORDERED that:

1) This motion is hereby GRANTED;

2) This Injunction is applicable only to indictment numbers 97-CRS-1174, 97-CRS-1620, 97-CRS-1621, and 97-CRS-1622 now pending in Union County, North Carolina;

3) There being only one factual issue in dispute, the State will provide Plaintiff with information determining whether taxes were assessed pursuant to the North Carolina Unauthorized Substances Tax on 49 grams of cocaine base that is the subject of indictment number 97-CRS-1619 now pending in Union County, North Carolina; and

4) Plaintiff will file a Motion For Summary Judgment in this matter as well as supporting briefs, not to exceed 25 pages in length, on or before November 3, 1998; the State will submit a Response, not to exceed 25 pages, to Plaintiff's Motion within 30 days of service of

same; and Plaintiff may submit a Reply, not to exceed 15 pages in length, within 30 days of service of the Response.

This 4th day of September, 1998.

/s/ GRAHAM C. MULLEN
CHIEF UNITED STATES DISTRICT JUDGE

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RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE, *MCADAMS V. HARDIN*, SEPTEMBER 14, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA

MICHAEL D. McADAMS,	)	
	)	
Petitioner,	)	
	)	1:98CV786
v.	)	
	)	
JAMES E. HARDIN,	)	
District Attorney, et al.	)	
	)	
Respondent.	)	

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Petitioner Michael D. McAdams, proceeding pursuant to 28 U.S.C. § 2254, filed this habeas corpus action on September 4, 1998. He is represented by retained counsel, Mr. William J. Thomas, II and Mr. Thomas F. Loflin, III. Michael McAdams is not the typical § 2254 habeas petitioner in federal court. He is not before this court challenging the constitutionality of a criminal conviction previously entered against him by a state court. Instead, he is here seeking an order that would prohibit the State of North Carolina from bringing him to trial on a pending indictment for violation of

the state's drug laws. His federal claim is that he would be subjected to double jeopardy if he were to be brought to trial on the state charges.

In support of his petition, McAdams represents to the court that he has previously been served with notice of an "unauthorized substance tax assessment" in the amount of $11,457 under the authority of N.C.G.S. § 105.113.111, a section of the North Carolina Controlled Substance Tax Act. His property was seized in satisfaction of the tax. He now stands indicted on three felony counts relating to the sale and/or possession of cocaine. Petitioner McAdams argues that he has already suffered a criminal penalty in the form of a tax assessment for possession of the controlled substances, and that taking him to trial on criminal charges related to the same drugs would constitute a second jeopardy.

Petitioner's trial in state superior court is calendared for the week of September 14. In view of this fact, McAdams has filed a motion to stay the state court proceedings until his federal rights can be determined in this habeas proceeding. Specifically, McAdams requests an order of this court staying the criminal proceedings against him in the Superior Court for Durham County, file no. 97-CRS-31835, wherein he is charged with three drug felonies.

The Respondents in this case include James E. Hardin, the District Attorney for Durham County and the State of North

Carolina, through the Office of the Attorney General (collectively hereafter, "the State"). Respondents are represented by Mr. Clarence J. DelForge, III, Assistant Attorney General. On September 4, the State filed an answer to the habeas corpus petition, a motion for summary judgment and memorandum in support thereof, and a response in opposition to the motion to stay the state court proceedings. It is unusual for the Petitioner's original papers and the State's responses to all be stamped "filed" as of the same date, September 4, but this circumstance reflects the parties' recognition that expedited procedures are necessary in view of the state court proceedings scheduled to begin as early as September 14.

The court, upon reviewing the filings of the parties, scheduled oral argument on McAdams' petition and motion to stay. On September 9, the court heard the argument of counsel. The court permitted a further written reply by Petitioner. With this record before the court, the court now enters the recommendations set out below.

PETITIONER'S MOTION TO STAY THE STATE COURT TRIAL

In attempting to stay his State criminal prosecution on double jeopardy grounds, McAdams confronts a formidable obstacle, namely the *Younger* doctrine. According to this doctrine, a federal court injunction of a state criminal

proceeding is "a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." *Younger v. Harris*, 401 U.S. 37, 41 (1971). *Younger* and its progenies instruct that federal courts should only rarely issue injunctive relief against pending state criminal proceedings.

While *Younger* counsels extreme caution, it does not preclude federal intervention in each and every case. To the contrary, the *Younger* Court indicated that the principles of federalism and comity must yield to weightier concerns in exceptional cases involving, for example, prosecutorial bad faith, statutes which on their face are patently unconstitutional, and situations where there is no adequate state forum available to hear the complaint. *Id.* at 53-54. Furthermore, the list of exceptions to the *Younger* abstention doctrine has been expanded by the lower federal courts. Most significant to this case, the Fourth Circuit recently determined that a double jeopardy allegation "is a preeminent example of one of the very few 'unusual circumstances' justifying federal court intervention in a state proceeding." *Gilliam v. Foster*, 75 F.3d 881, 904 (4th Cir. 1996).

A careful review of *Gilliam*, however, shows that not all double jeopardy claims merit the same treatment. Rather, a key factor present in *Gilliam* that is notably absent from this case is the subjection of the defendant to the hardships of an actual second trial. In this case, Petitioner's alleged "first jeopardy"

was an administrative action in which Petitioner made no appearance. As the Fourth Circuit noted in *Gilliam*, "because the Double Jeopardy Clause of the Fifth Amendment protects not only against multiple convictions but also "against being twice put to trial for the same offense," a portion of the constitutional protection it affords would be irreparably lost if Petitioners were forced to endure the *second trial* before seeking to vindicate their constitutional rights at the federal level." *Id.* at 904 (quoting *Abney v. United States,* 431 U.S. 651, 660-61 (1977)) (emphasis added). Thus, in balancing the potential harm faced by a defendant asserting the protection afforded by the Double Jeopardy Clause with the potential harm to the independence of the state courts, the mere fact that the defendant has made a theoretically viable double jeopardy claim is not enough to justify federal court intervention. *See United States ex rel. Stevens v. Circuit Court of Milwaukee County,* 675 F.2d 946, 949 (7th Cir. 1982) ("Where as in the present case the defendant is not being asked to stand trial a second time - where the first proceeding was as perfunctory as the Constitution allows a guilty-plea proceeding to be - the balance inclines in favor of the state's interest in being allowed to conduct its criminal proceedings without interruption by federal judges. . . . We think the *Younger* policy is the weightier when the defendant is not being asked to undergo a second trial."); *Murphy v. Virginia,* 896 F. Supp. 577 (E.D. Va. 1995) (For purposes of determining whether *Younger* abstention doctrine applies, courts draw a distinction between double jeopardy claims based on multiple punishments and

claims based on multiple prosecutions such that, if the accused is facing multiple convictions, he may appeal those convictions to obtain full relief, where if facing multiple prosecutions, the trial itself is a constitutional wrong, and no trial or appeal therefrom could provide him with an adequate remedy.).

In the case at bar, McAdams is at worst facing the possibility of multiple criminal punishments for his alleged drug activity. He is not being forced to endure the hardships associated with a second full trial. Thus, under a proper reading of *Gilliam,* the principled policies of *Younger* weigh against federal intervention in this case.

Even if the court were to find that the distinction between multiple punishments and multiple convictions was not, in itself, enough to support abstention, a further reading of *Gilliam* indicates that Petitioner McAdams' motion for a stay should be denied in the present case. The *Gilliam* court stressed that federal court interference in state court proceedings is warranted only in the limited circumstance where the Petitioner has made a *"colorable claim* that a second trial will violate a defendant's double jeopardy right." *Gilliam,* 75 F.3d at 904 (emphasis added). Petitioner, in the case at bar, has failed to make the required showing of apparent merit to his double jeopardy claim.

McAdams contends that the drug tax assessed against him by the state constitutes a criminal penalty, such that a

subsequent criminal trial for offenses based upon the same, previously taxed drugs would constitute a second criminal penalty in violation of the Double Jeopardy Clause. In support of his argument, McAdams cites *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998), *cert. petition filed*, 66 U.S.L.W. 3750, May 11, 1998, No. 97-1829 (pending), a recent Fourth Circuit decision which held that the North Carolina drug tax is a criminal penalty. The Court of Appeals based its decision upon *Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994), a Supreme Court decision that held a Montana controlled substance tax to constitute a criminal penalty.

The *Lynn v. West* decision does not, however, answer all of the questions that must be addressed in the case at bar. It is critically important that, on federal habeas review, a state prisoner may not rely on federal circuit precedent to establish a claim for relief. 28 U.S.C. § 2254(d)(1); *Green v. French*, 143 F.3d 865, 880-84 (4th Cir. 1998) (North Carolina courts may reject Fourth Circuit's adjudication of federal constitutional law so long as state court adjudication reasonably followed United States Supreme Court precedent.). Furthermore, where a state court applies a United States Supreme Court decision to a particular statute or set of facts, the state court opinion cannot be overturned on federal habeas review unless it is unreasonable. 28 U.S.C. § 2254(d)(1). To be unreasonable, a state court application of federal constitutional law must be so clearly erroneous that no reasoning jurist could have reached the same result. *See Green*

v. French, 143 F.3d 865, 870 (4th Cir. 1998); *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1114 (1997).

The North Carolina appellate courts have analyzed the state drug tax statute in light of the Supreme Court's decision in *Kurth Ranch*, and concluded that the statute was significantly distinguishable from the Montana statute so that the North Carolina tax assessment was not a criminal penalty. *See State v. Creason*, 123 N.C. App. 495, 473 S.E.2d 771 (1996), *affirmed*, 346 N.C. 1165, 484 S.E.2d 525 (1997); *State v. Ballenger*, 123 N.C. App. 179, 472 S.E.2d 572 (1996), *affirmed per curiam*, 345 N.C. 626, 481 S.E.2d 84, *cert. denied*, 118 S. Ct. 68 (1997). Both *Creason* and *Ballenger* held that *Kurth Ranch* was distinguishable because, unlike the Montana tax adjudicated in that case, the

> North Carolina Controlled Substance Tax is not predicated upon whether the taxpayer in possession of the controlled substance has been arrested or charged with criminal conduct, nor is it assessment on property that necessarily has been confiscated or destroyed. Specifically, the North Carolina Controlled Substance Tax provides that 'a tax is levied on controlled substances and counterfeit controlled substances possessed by dealers . . .' at various rates depending on the type of controlled substance possessed.

Ballenger, 472 S.E.2d at 574. While the Fourth Circuit in *Lynn* found these facets of the North Carolina statute not so distinguishable from the aspects of the Montana statute analyzed in *Kurth Ranch*, this contrary circuit authority does not, by its mere existence, render the state decisions necessarily "unreasonable." Rather, this court must survey the judicial landscape in an effort to compare cases from other jurisdictions to determine whether the conclusions reached by the North Carolina courts are so clearly incorrect as to be indefensible among reasonable jurists. *See Green v. French*, 143 F.3d at 880-84 (North Carolina courts may reject Fourth Circuit's adjudication of federal constitution law so long as state court adjudication reasonably follows United States Supreme Court precedent. In addition, fact that other courts followed North Carolina adjudication and rejected Fourth Circuit position shows North Carolina court's adjudication was reasonable.).

An overview of appellate decisions from state courts across the country shows that numerous courts have found respective state drug tax statutes, substantially similar to North Carolina's unauthorized substance tax, distinguishable from the Montana statute analyzed in *Kurth Ranch* on the same essential grounds North Carolina's appellate courts distinguished the Montana statute in *Ballenger* and *Creason*. These cases tend to show that reasonable jurists can and do agree with the North Carolina appellate courts' adjudication of this double jeopardy issue, although still contrary to the Fourth Circuit's adjudication in *Lynn*.

RECOMMENDATION, *MCADAMS V. HARDIN*, CONTINUED . . .

Under these circumstances, Petitioner's motion for a stay of the state criminal proceedings soon to commence against him cannot be granted by this court. *See McMullin v. South Carolina Dept. of Revenue*, 321 S.C. 475, 469 S.E.2d 600 (1996) (South Carolina drug tax upheld because it does not contain the "unusual features" of the Montana tax analyzed in *Kurth Ranch*); *State v. Gulledge*, 257 Kan. 915, 896 P.2d 378 (1995) (court found that the Kansas drug tax was significantly different from the Montana tax because it did not contain any of the "unusual feature" relied upon by the Court in *Kurth Ranch*); *State v. Stubblefield*, 249 Neb. 436, 543 N.W.2d 743 (1996) (found *Kurth Ranch* inapplicable, determining that the Nebraska statute and Montana's differ in material respects); *State v. Lange*, 531 N.W.2d 108 (Iowa 1995) (found that *Kurth Ranch* did not apply and concluded that the Iowa tax was not a criminal penalty); *Covelli v. Comm'r. of Revenue*, 235 Conn. 539, 668 A.2d 699 (1995), *vacated and remanded*, 518 U.S. 1031, *prior opinion affirmed per curiam*, 239 Conn. 257, 683 A.2d 737 (1996) (Connecticut court reaffirmed previous opinion vacated by United State Supreme Court that the state drug tax did not possess identical characteristics of *Kurth Ranch* and therefore did not constitute a criminal penalty for double jeopardy purposes), *cert. denied*, 117 S.Ct. 1445 (1997). Petitioner has not shown a colorable double jeopardy claim for which he would be entitled to habeas relief. Lacking such a

"colorable claim," Petitioner cannot meet the *Gilliam* test for federal intervention in a state criminal trial.[1]

THE STATE'S SUMMARY JUDGMENT MOTION

The State moves for summary judgment on McAdams' habeas corpus petition on grounds that (1) Petitioner has failed to exhaust state remedies with respect to his double jeopardy claim, and (2) the double jeopardy claim is without merit because the superior court opinion rejecting Petitioner's claim is a reasonable application of the Supreme Court's decision in *Kurth Ranch* and therefore, under the standard established in 28 U.S.C. § 2254(d)(1), cannot be overturned on habeas review. On consideration of the argument of the parties, the court finds that the State's first contention is well-taken. Petitioner McAdams has not exhausted available state remedies, and his petition should be dismissed. *See* 28 U.S.C. § 2254(b)(1)(A). The court should not reach Petitioner's double jeopardy claim on the merits.

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[1] In final reply, Petitioner attaches a copy of a recent opinion from the Western District of North Carolina wherein a state drug prosecution was stayed on double jeopardy grounds *in a § 1983 action*. The present action before this court sounds in habeas corpus. Therefore, the deferential standard set out in the new federal habeas corpus amendments applies. In this court's opinion, an action seeking the relief sought here, determination that a pending state prosecution would violate the Double Jeopardy Clause, *must* lie in habeas corpus, not § 1983 procedure.

RECOMMENDATION, *MCADAMS V. HARDIN*, CONTINUED . . .

The state court opinion in issue in this case is a pretrial ruling by the superior court to the effect that prosecution of McAdams in 97-CRS-31835 is not barred by the double jeopardy clause. In a written order, the state judge denied McAdams' motion to dismiss and his "Plea of Former Jeopardy." (State Exh. 1) Petitioner has not sought interlocutory appellate review of this order by filing a writ of certiorari in the North Carolina Court of Appeals or the Supreme Court of North Carolina. While Petitioner contends he has no right to interlocutory review under state procedures, it is clear that his pretrial double jeopardy objection is preserved for ultimate appellate review should he be convicted. Since this court has found no basis for staying Petitioner's state trial, that proceding will presumably go forward as scheduled and result in a judgment of acquittal or conviction, or some other final disposition. Petitioner can then receive review by the North Carolina appellate courts of any claimed error by the trial court, including alleged error in denial of the motion to dismiss on double jeopardy grounds.[2] Clearly, Petitioner has not availed himself of appellate review that is or will be available to him in the state courts.

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[2] Adherence to ordinary principles of complete exhaustion is of heightened importance in a case such as this where the petitioner has not even been convicted in state court. Petitioner's legal claim could obviously be mooted or materially altered by the outcome of his state court trial.

RECOMMENDATION, *MCADAMS V. HARDIN*, CONTINUED . . .

Petitioner McAdams asserts that any presentation of his double jeopardy claim to the state appellate courts would be futile in view of prior North Carolina decisions. The court must reject this claim. It is true that exhaustion may be excused when it is clear that further presentation of a claim to the state courts would be a waste of judicial resources. For example, exhaustion is excused when the state supreme court has determined the same issue, in a manner unfavorable to the petitioner, in a recent case. *See Allen v. Attorney General*, 80 F.3d 569, 573 (1st Cir. 1996); *Wallace v. Cody*, 951 F.2d 1170, 1172 (10th Cir. 1991). The Supreme Court of North Carolina has twice rejected the sort of double jeopardy claim asserted by Petitioner McAdams. *See State v. Ballenger*, 345 N.C. 626 (1997) and *State v. Creason*, 346 N.C. 165 (1997). Nonetheless, subsequent to those decisions the Fourth Circuit decided *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998), *cert. petition filed*, 66 U.S.L.W. 3750, May 11, 1998, No. 97-1829 (pending), determining that North Carolina's controlled substances tax constitutes a criminal penalty. The *Lynn v. West* decision has not been considered by the North Carolina appellate courts. The principles of comity that underlie the exhaustion requirement counsel strongly in favor of allowing the state courts an opportunity to consider Petitioner's double jeopardy claim in light of *Lynn v. West* before this court entertains such a claim on the merits. Under these

circumstances, Petitioner's "futility" argument is not persuasive.[3]

The court therefore should not reach McAdams' petition on the merits, but should dismiss the petition for lack of exhaustion pursuant to 28 U.S.C. § 2254(b)(1)(A).

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[3] Moreover, there are other facets to Petitioner's double jeopardy claim beyond the issue of whether North Carolina's controlled substances tax is a "criminal penalty." Even if it is construed to be a criminal penalty, it does not inevitably follow that a double jeopardy is established by a subsequent criminal prosecution. *See Kurth Ranch,* 511 U.S. at 781-82 n. 21 ("[This Montana tax statute] does not raise the question whether an ostensibly civil proceeding that is designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character. See JUSTICE SCALIA'S dissent, *post,* at 804. Nor does the statute require us to comment on the permissibility of "multiple punishments" imposed in the same proceeding, cf. *Ex parte Lange,* 18 Wall. 163 (1874); *North Carolina v. Pearce,* 395 U.S. 711 (1969), since it involves separate sanctions imposed in *successive* proceedings.") Accordingly, the state courts should be given the first opportunity to consider whether a double jeopardy claim is made out as to any conviction against Petitioner (if he is convicted) even assuming that the North Carolina tax may be construed as a criminal penalty.

RECOMMENDATION

For reasons set forth above, IT IS RECOMMENDED that Petitioner McAdams' motion to stay the state criminal trial against him be denied, and that his petition for a writ of habeas corpus be dismissed for lack of exhaustion.

/s/ P. Trevor Sharp, U.S. Magistrate Judge

September 14, 1998